Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HISTORIC GREEN SPRINGS, INC.,

Petitioner,

vs.

VIRGINIA VERMICULITE, LTD., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

With its decision in this case, the Fourth Circuit has caused the nation's antitrust laws to run amuck. A non-profit conservation organization, dedicated to the preservation of a historically significant area in rural Virginia, fought for years to protect the area from the ravages of mining. Its efforts proved successful for more than two decades, until its most virulent opponent, a local mining concern, turned the antitrust laws on their head to challenge, as a violation of Sherman Act § 1, the non-profit group's acceptance of donations of land from another mining company. Even though the donations were made exclusively for preservation purposes, as specifically authorized by the Internal Revenue Code, and notwithstanding contrary precedent in several other circuits, the Fourth Circuit let the claim stand. In so doing, the Fourth Circuit extended the scope of the Sherman Act to cover conduct that Congress never intended it to reach.

The questions raised by the Fourth Circuit's opinion are:

1. Whether a non-profit organization that, in pursuit of its non-commercial mission, accepts a donation of land with conditions that restrict its future use in a manner consistent with that organization's mission engages thereby in commercial conduct for purposes of Section 1 of the Sherman Act.

2. Whether otherwise non-commercial conduct engaged in by a non-profit organization in pursuit of its non-commercial mission is transformed into commercial conduct for purposes of Section 1 of the Sherman Act solely because the conduct has some incidental effect on a commercial market or some collateral benefit to that organization.

3. Whether Section 1 of the Sherman Act limits or conditions the right of a non-profit organization to accept donations of land for conservation or preservation purposes in conformity with the Historic Structures Tax Act, I.R.C. § 170(h).

RULE 29.6 STATEMENT

The Historic Green Springs, Inc. ("HGSI" or "Historic Green Springs") is a non-profit Virginia corporation dedicated to the preservation of the Green Springs National Historic Landmark District. HGSI has no parent companies, subsidiaries, or affiliates.

PARTIES TO THE PROCEEDINGS BELOW

The following additional persons and entity were parties to the consolidated proceedings in the court of appeals and are respondents herein:

W.R. Grace & Company—Connecticut
M.F. Peers, Jr.
Norma Peers

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Historic Green Springs respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-16a) is reported at 156 F.3d 535 (4th Cir. 1998). The opinion of the district court (App., *infra*, 17a-75a) is reported at 965 F. Supp. 802 (W.D. Va. 1997).

JURISDICTION

The court of appeals entered its judgment on September 1, 1998, and denied a timely petition for rehearing and suggestion for rehearing en banc on October 13, 1998. On December 29, 1998, this Court (Rehnquist, C.J.) granted an extension of time for the filing of a petition for writ of certiorari until February 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Internal Revenue Code, 26 U.S.C. § 170, are reproduced, *infra*, at App. 76a and 77a-80a, respectively.

STATEMENT OF THE CASE

This case involves questions of critical importance to the proper reach of the Sherman Act relative to non-commercial activity and the implementation of federal historic preservation, land conservation, and tax policies. A small but active non-profit historic preservation organization, petitioner Historic Green Springs, has long accepted donations of land and conservation easements in order to further its mission of protecting the Green Springs National Historic Landmark District (the "Landmark District") and its environs in Louisa

County, Virginia.[1] In accordance with its conservation mission, from 1992 to 1994, HGSI accepted donations from W.R. Grace & Company—Connecticut ("Grace") of interests in approximately 1,300 acres in and near the Landmark District. Portions of the land subject to the donations contained deposits of vermiculite, a mineral mined elsewhere by Grace, among others, and used in the manufacture of various consumer products. In so doing, Historic Green Springs sought to preserve the land for future generations and to protect it from the irreparable harm caused by mining or other commercial activity.

Respondent Virginia Vermiculite, Ltd. ("VVL"), a competitor of Grace in the vermiculite industry and long-time opponent of HGSI's preservation efforts, responded to this charitable donation by suing both Grace and HGSI, alleging that the donation constituted an agreement or combination in restraint of trade in violation of Section 1 of the Sherman Act. The district court dismissed the Sherman Act § 1 claim against both Grace and HGSI, and the entire case as to HGSI, finding, *inter alia*, that the Sherman Act was not intended to apply to a non-profit group's acceptance of a charitable donation in pursuit of its non-commercial mission. The Fourth Circuit, while acknowledging that its decision conflicted with decisions of the Seventh, Ninth, and District of Columbia Circuits—and without addressing the validity of

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[1] Located in western Louisa County, the Landmark District is a unique geographic area, which is roughly in the shape of an oval basin approximately 6 1/2 miles long and 4 1/2 mile wide, encompassing more than 14,000 acres. Its enduring rural character and assemblage of more than 250 historic buildings bear witness to the evolution of American rural life from the time of the Revolution to the mid-1800's and earned it a designation as a National Historic Landmark District in 1973. Even today, more than 25 years later, only 155 districts nationwide have qualified for this status, which reflects the Landmark District's "exceptional value to the nation as a whole." 36 C.F.R. § 65.2(a); *see* 16 U.S.C. § 470a(a).

HGSI's federally-sanctioned goals—reversed, and remanded the case for a trial on the merits and the potential award of treble damages against HGSI.

A. HGSI And The Grace Donations

Historic Green Springs is a small Section 501(c)(3) non-profit corporation, with neither salaried staff nor any income source other than donations. It was formed in the early 1970s by historic preservationists to protect the historically rural character of the Landmark District. As alleged in VVL's Second Amended and Supplemented Complaint (the "Complaint"), since 1973 HGSI's charter has provided that:

> [Historic Green Springs] is organized for charitable and educational purposes: to maintain and protect the beautiful and historic Green Springs area as an important heritage for the State of Virginia and her people, without pecuniary gain or profit to its members or to any private individual and not to engage in a regular business of a kind ordinarily carried on for profit. Its purposes shall include historical and ecological research and education; the development of a community land-use plan to eliminate blight and prevent future deterioration; [and] rendering assistance to like oriented organizations (historical and environmental).

(Compl. ¶ 29.)

Historic Green Springs first came to prominence through its successful opposition to plans by the State of Virginia to use federal funds to construct prison facilities in the Landmark District, in violation of the National Historic Preservation Act and the National Environmental Policy Act. *See, e.g., Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974).

Historic Green Springs subsequently opposed efforts by Grace and VVL to mine vermiculite in the Landmark

District. Vermiculite mining utilizes "pit-mining" techniques, which are similar in nature and effect to strip mining, and which would therefore inflict severe adverse effects on the character of the District and jeopardize its landmark status. HGSI has for some 20 years opposed vermiculite mining in the District. (Compl. ¶ 33.) In this connection, HGSI has sought and accepted conservation easements on property in the Landmark District, which it has subsequently donated to the Department of the Interior. *See Historic Green Springs, Inc. v. Bergland*, 497 F. Supp. 839, 842 (E.D. Va. 1980) (detailing inception of easement program).[2]

Although Grace had owned mineral-bearing lands and mining rights on real property in Louisa County since 1972, it never mined this property. Instead, in 1992 Grace decided to donate this property to Historic Green Springs, doing so in three installments between 1992 and 1994. Those donations (the "Grace Donations") were, according to the Complaint, made pursuant to an alleged agreement or understanding between HGSI and Grace to prevent vermiculite mining by

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[2] In the *Bergland* decision, VVL (which participated as an intervenor) sought to rescind or invalidate the historic designation of the Landmark District, and to set aside HGSI's donation of conservation easements (which, among other things, would preclude vermiculite mining) to the Department of the Interior. The *Bergland* decision granted the relief sought by VVL based upon the lack of specific criteria for the National Historic Landmark program. Congress, however—in an early recognition of the importance of conservation easements—promptly responded by ratifying both the designation of the Landmark District and the transfer of conservation easements to the Department of the Interior. 16 U.S.C. § 470a(a)(1)(B), *as amended by* Pub. L. No. 96-515, 94 Stat. 2988 (Dec. 12, 1980). In the ensuing 20 years, conservation easements and related private land protection mechanisms have been used to protect more than 4 million acres nationwide—an area about the size of the State of Connecticut. *See* Land Trust Alliance, *1994 National Land Trust Survey*, Summary (1995).

VVL or anyone else on the properties at issue. (Compl. ¶ 67.) The Donations were accomplished with respect to the so-called "Peers properties" pursuant to quit claim deeds of gift, under which the prior owners, the Peers families, retained certain subsurface mineral rights. (*Id.* ¶¶ 43, 51.) All but the last of these gifts were made subject to restrictive covenants that expressly prohibited future vermiculite mining; as for the last gift, the Complaint alleged a further "understanding and agreement that HGSI would not allow it to be mined for vermiculite . . . ."[3] (*Id.* ¶ 51.) Finally, the Complaint alleged that, as the result of the Grace Donations, "Grace profited . . . by receiving a sizeable income tax donation." (*Id.* ¶ 25.)

B. Proceedings Below

VVL responded to the Grace Donations by suing HGSI and Grace, alleging, *inter alia*, violation of Section 1 of the Sherman Act. In its initial complaint, filed on February 21, 1995, VVL contended that Grace's donation to Historic Green Springs of land with restrictive covenants as to its future use constituted an agreement, combination, or conspiracy in restraint of trade in violation of Sherman Act § 1. After limited discovery, HGSI and Grace moved to dismiss the complaint. Following oral argument, Magistrate Judge B. Waugh Crigler afforded VVL an opportunity to amend its complaint, specifically to include additional allegations about Historic Green Springs. Grace and HGSI renewed their motion to dismiss, and following a further hearing, the magistrate judge issued a report on September 19, 1995 recommending dismissal of the suit against HGSI. Over exceptions filed by VVL, including its proposed Second

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[3] HGSI and Grace dispute this allegation, as they dispute numerous allegations in the Complaint. Nonetheless, such allegations must be accepted as true for purposes of HGSI's Rule 12 motion to dismiss—the resolution of which is the subject of this Petition.

Amended and Supplemented Complaint, District Judge James H. Michael adopted the Magistrate's recommendation. Concluding that the Sherman Act "makes no value judgment that competition in the business world should be elevated over pursuit of non-commercial social or political objectives," the district court issued an April 22, 1997 order and opinion dismissing, *inter alia*, the claims against Grace and HGSI under Section 1 of the Sherman Act and a related Virginia state antitrust statute. App. 17a, 37a.

The District Court's decision dismissing HGSI from the case was certified as final pursuant to Federal Rule of Civil Procedure 54(b), by order dated June 11, 1997, and VVL filed a timely notice of appeal to the Fourth Circuit on June 17, 1997. The appeal was consolidated with appeals from two related cases arising out of claims assigned to VVL by the Peers family. The consolidated appeal was briefed by the parties and *amici curiae*, including the National Trust for Historic Preservation and the Land Trust Alliance, and argued on December 4, 1997. On September 1, 1998, the Fourth Circuit issued an opinion reversing the District Court on all grounds.

For present purposes, only Part III of the Fourth Circuit's opinion is at issue, in which the court held that the district court erred in dismissing the antitrust claims against Historic Green Springs because "the transaction [between HGSI and Grace] was fundamentally commercial." App. 12a. The Fourth Circuit acknowledged that "[a] number of our sister circuits have held that, in certain circumstances, nonprofit organizations are not subject to antitrust liability." *Id.* at 10a. Nonetheless, the court went on to find "[a]mple evidence suggest[ing] the commercial nature of the transaction" in two sets of circumstances. *Id.* at 10-11a. *First*, according to the Fourth Circuit, the "transaction between Grace and HGSI had obvious effects on the commercial market for vermiculite." *Id.* at 11a. *Second*, the Grace Donations purportedly "had

direct commercial benefits for HGSI itself: by receiving hundreds of acres of land, HGSI not only realized a substantial 'pecuniary gain,'" but, in the Fourth Circuit's view, it "also protected the alleged commercial interests of its management and members, which might be affected by mining of the land." *Id.*

REASONS FOR GRANTING THE PETITION

For much of this century, Congress has recognized and encouraged, and this Court has upheld, the social utility of both charitable donations and the preservation of historic buildings and places. The Fourth Circuit's decision in this case—in holding that the mere acceptance of a donation of land for preservation purposes can subject a non-profit organization to antitrust liability—does violence to both policy goals. The court's ill-considered decision as to the "fundamentally commercial" character of the Grace Donations conflicts, by its own admission, with decisions of this Court and of the Seventh, Eighth, Ninth, and District of Columbia Circuits. The decision also fails to take into account that the Donations are alleged to have been made to serve purposes that are promoted and protected by a number of other federal statutes, including the Historic Structures Tax Act, the National Park Service Organic Act, and the National Historic Preservation Act. Unless reversed now, the Fourth Circuit's decision will allow commercial interests, such as VVL, to circumvent Congressional policies for their own economic advantage and to use the antitrust laws unfairly and perversely to drive non-profit groups, like Historic Green Springs, out of existence.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND SEVERAL OTHER CIRCUITS AS TO WHETHER A NON-PROFIT ORGANIZATION'S ACCEPTANCE OF DONATIONS, IN PURSUIT OF ITS NON-COMMERCIAL MISSION, CONSTITUTES COMMERCIAL CONDUCT FOR PURPOSES OF THE SHERMAN ACT

For as long as this Court has been deciding cases under the antitrust laws, Section 1 of the Sherman Act has been held to apply only to "business" or "commercial" conduct. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Swift & Co. v. United States*, 196 U.S. 275 (1905). The paradigm of "non-commercial" conduct, and thus the very "antithesis of commercial activity" for such purposes, is the conduct of a non-profit organization in accepting donations to further its non-commercial purpose. *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993). Indeed, it had been so widely accepted that such conduct was obviously "non-commercial" that this Court, until now, has never been called upon to address this precise issue. However, in case after case, this Court has circumscribed the application of the antitrust laws in analogous contexts in a way that makes clear that a non-profit group's mere acceptance of a donation in furtherance of a financially disinterested, socially desirable goal cannot constitute a Sherman Act § 1 violation.

The Fourth Circuit's decision that a donation of land to a non-profit organization for preservation purposes can violate Sherman Act § 1 represents a sharp departure from this long-accepted understanding and conflicts, in reasoning and result, with decisions by this Court and the Seventh, Eighth, Ninth, and District of Columbia Circuits, and must be reversed now before more harm befalls similarly situated charitable organizations.

A. HGSI'S Acceptance Of The Grace Donations In No Way Constitutes Commercial Conduct

The Fourth Circuit's decision that HGSI's acceptance of the Grace Donations for preservation purposes constitutes "commercial conduct" conflicts directly with the Ninth Circuit's decision in *Dedication & Everlasting Love to Animals (DELTA) v. Humane Soc'y*, 50 F.3d 710 (9th Cir. 1995). In *DELTA*, a non-profit animal protection group alleged that another non-profit group had conspired with potential contributors and "providers of valuable services" to restrain competition in the market for "solicitation of donations" to animal protection organizations. While acknowledging that a "nonprofit organization . . . may engage in commercial activity, and this activity will then be subject to the Sherman Act," the Ninth Circuit ultimately found that the plaintiff "had failed to offer any reason for [the court] to believe that the Sherman Act applies to the solicitation of donations," and therefore affirmed the district court's grant of summary judgment dismissing the case. *Id.* at 711-13.

The *DELTA* court reached this decision on the basis of an "unbroken line of decisions by [the Supreme Court that] have defined what is meant by the restrictive terms chosen by Congress to express the scope of the statute." *Id.* at 712. Under this line of precedent:

> Not every aspect of life in the United States is to be reduced to such a single-minded vision of the ubiquity of commerce. If self-serving activity is necessarily commercial, the Sherman Act embraces everything from a church fair to the solicitation of voluntary blood donors. On this basis, every engagement or marriage would be a restraint of trade, subject to suit and defensible only by application of the rule of reason.

Id. at 714. The Ninth Circuit thus refused to make the "leap from the conclusion that charitable form confers no immunity to the conclusion that charitable activities are subject to the Sherman Act when they do not constitute trade in the sense of the common law." *Id.* at 713. To do so would turn the Sherman Act into "an open charter, a hunting license to be used where any prosecutor, plaintiff and judge sees an evil encompassed by the statute's purpose." *Id.*

Instead, the Ninth Circuit ruled unequivocally that the Sherman Act did not apply to a non-profit organization's solicitation and acceptance of donations in furtherance of its social action goals:

> If statutory language is to be given even a modicum of meaning, the solicitation of contributions by a nonprofit organization is not trade or commerce, and the Sherman Act has no application to such activity.

Id. at 712. Significantly, the Ninth Circuit reached this conclusion notwithstanding its implicit recognition that the non-profit defendant was alleged to have conspired with its contributors (who, by virtue of their ability and desire to make charitable contributions, were "commercial" entities) and the "providers of valuable services" (who, by virtue of the "value" attributed to their "services," were also "commercial entities").

The Fourth Circuit's conclusion in this case that HGSI's successful solicitation of the Grace Donations was an "essentially commercial" transaction is flatly inconsistent with the Ninth Circuit's holding in *DELTA*. Historic Green Springs is alleged to have done no more here than did the defendant in DELTA—each accepted donations for charitable purposes from a commercial entity that may or may not have had its own commercial motives. Left uncorrected, the Fourth Circuit's decision, and its conflict with the Ninth Circuit, promises to spawn further

inconsistent decisions on this issue. This case provides an opportunity for this Court to furnish much needed guidance to the lower federal courts on this important question.

B. Incidental Effects On Commercial Markets Cannot Transform Non-Commercial Conduct Into Commercial Conduct

The Fourth Circuit's decision is also in conflict with decisions by this Court and other circuits in holding that HGSI's acceptance of donations from Grace was "essentially commercial" because the transactions had "obvious effects on the commercial market for vermiculite." App. 11a. All the other courts that have considered this question—including this Court and the Seventh, Eighth, and District of Columbia Circuits—have concluded that collateral or incidental effects on a "commercial market" will not, in and of themselves, transform what is otherwise "non-commercial" conduct into "commercial" conduct for purposes of the Sherman Act.

This Court so concluded in unequivocal terms in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), in which a boycott of local Mississippi merchants by black civil rights groups was challenged on state antitrust grounds. This Court held that, because the boycott was directed at securing "equality and racial justice," it was protected by the First Amendment, and therefore could not be subject to antitrust challenge—notwithstanding the fact that "the petitioners foresaw—and directly intended that the merchants would sustain economic injury as a result of their campaign." 458 U.S. at 914.

The Seventh Circuit reached the same conclusion in *National Org. for Women (NOW) v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *aff'd in part and rev'd in part*, 510 U.S. 249 (1994), by looking to the statutory language and legislative history of the Sherman Act to conclude that "Congress did not intend to reach every activity that might affect business." *Id.* at 620. In *Scheidler*, NOW alleged that the defendants

had conspired to restrain competition in the nationwide market for abortion services. While acknowledging the impact of defendants' activities on the business of the affected abortion clinics, the Seventh Circuit held that those activities did not fall within the ambit of the antitrust laws. In support of this conclusion, the court pointed to an 1889 Congressional debate antedating passage of the Sherman Act in which Senator Sherman himself assured another Senator that temperance society activities "tend[ing] to compel persons engaging in retailing liquor . . . to give up their business" would not subject temperance societies to antitrust liability. *Id.* at 618. In the Seventh Circuit's view, the disruptive effect of anti-abortion activities on the business of abortion clinics no more made those activities "commercial" than had the equally disruptive effect of temperance crusaders on the retail liquor industry.

The Eighth Circuit similarly concluded in *State of Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980), that Congress did not intend to "protect 'free and fair' competition from political or social activities that can have *the same effect upon competition as the commercial activities* of a trust against a business." *Id.* at 1305 (emphasis added). In *NOW*, the State of Missouri contended that a boycott organized by NOW to support passage of the Equal Rights Amendment ("ERA") constituted a Sherman Act § 1 conspiracy. *Id.* Despite acknowledging that "NOW's campaign was intended to and did in fact injure Missouri in its relationship with its convention customers," the Eighth Circuit rejected Missouri's efforts to impose antitrust liability on NOW, concluding that Missouri's "direct injury" was merely an "incidental effect" of NOW's patently "uncommercial" "campaign to influence governmental action." *Id.* at 1315. It thus found no Sherman Act violation.

The District of Columbia Circuit reached much the same conclusion in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*,

432 F.2d 650 (D.C. Cir. 1970). In *Marjorie Webster*, a college that had been denied accreditation by a non-profit association of colleges sued the association claiming violation of the Sherman Act. The District of Columbia Circuit rejected this attempt to impose antitrust liability, reasoning that while the denial of accreditation might have an effect on the "business" of education, *id.* at 654, "accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself." *Id.* at 655. In so doing, the court recognized that "not every form of combination or conspiracy that restrains trade falls within [the] ambit" of the Sherman Act. *Id.* at 653. Thus, notwithstanding the potential effect of the defendant's activities on competition in the college recruitment market, these activities were held to be beyond the reach of the Sherman Act.

The Fourth Circuit broke with this established line of precedent by holding that the "obvious effects" of the Grace Donations on the "commercial market for vermiculite" were enough to make HGSI's conduct in accepting the Donations "commercial" for purposes of the Sherman Act. App. 11a. The temperance crusade, the anti-abortion demonstrations, the ERA boycott, and the civil rights boycotts all had effects on "commercial" markets at least as "obvious" as anything Historic Green Springs did in this case. Yet, in each of those cases, the courts concluded that the Sherman Act did not reach the social or political activity at issue. The relevant inquiry for purposes of antitrust liability is not whether HGSI's pursuit of its conservation and preservation goals had some alleged effect on a commercial market. The question should instead be whether HGSI's *conduct* was in itself "commercial" or "non-commercial."

Thus, the "commercial effect" inquiry on which the Fourth Circuit relied puts it squarely in conflict with the decisions of this Court and the three circuits that have already considered the issue. This case provides the Court with an

opportunity to resolve this important conflict and restore predictability to the law.

C. Incidental Benefits To Financially Disinterested Actors Cannot Transform Non-Commercial Conduct Into Commercial Conduct

The Fourth Circuit's decision also conflicts with decisions by this Court and other circuits in concluding that the Grace Donations were "essentially commercial" because they resulted in "direct commercial benefits for HGSI itself." App. 11a. Successful advocacy or fundraising efforts by non-profit organizations inherently benefit such organizations, but until the Fourth Circuit's decision in this case, no court had deemed incidental or collateral benefits of this nature sufficient to transform "non-commercial" conduct into "commercial" conduct. To the contrary, this Court and the Seventh, Eighth and Ninth Circuits had all held that collateral benefits not directly traceable to the disputed restraint on competition, could *not* convert "non-commercial" conduct into "commercial" conduct.

The Ninth Circuit reached this conclusion most unambiguously in *DELTA v. Humane Soc'y*, 50 F.3d 710 (9th Cir. 1995). In *DELTA*, the plaintiff had alleged that benefits flowing to the Humane Society's officers demonstrated that the organization was engaged in "trade or commerce" for Sherman Act § 1 purposes. The Ninth Circuit rejected this argument without qualification:

> Consensual conduct is not necessarily commercial conduct even though reciprocation is the normal accompaniment of consensual conduct. From its donations [defendant] derives reputation, prestige, money for its officers; it does not engage in trade or commerce; and so no Sherman Act claim against it was stated by [plaintiff].

Id. at 714.

The Eighth Circuit in *State of Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980), similarly did not let incidental benefits that might flow to ERA supporters as a result of NOW's boycott stand in the way of its conclusion that the boycott was "non-commercial" for Sherman Act purposes. Although it was apparent to the *NOW* court that passage of the ERA would result in various benefits for many of its champions, including higher salaries, better quality of life, and greater self-esteem, these benefits alone could not bring the boycott within the ambit of the Sherman Act. "While it is obviously perceived by the members of NOW as beneficial," the Eighth Circuit concluded, "[t]he ERA is not a 'financial,' 'economic,' or 'commercial' piece of legislation." *NOW*, 620 F.2d at 1311. Hence, NOW's boycott activities were deemed to be beyond the reach of the Sherman Act.

Consistent with this reasoning, the Seventh Circuit in *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *aff'd in part and rev'd in part*, 510 U.S. 249 (1994), recognized that the Sherman Act was "intended to prevent business competitors from making restraining arrangements for their own economic advantage," but ultimately concluded that the "economic advantage" of the anti-abortion protesters in that case was not truly at issue. 968 F.2d at 621. In *Scheidler*, NOW contended that the abortion opponents sought to restrain trade in an alleged market for abortion services. However, the Seventh Circuit found that, since the defendants did not sell abortion services—to the contrary, they vigorously opposed the provision of such services—any benefits the defendants derived from their activities were not attributable to any "restraining arrangements" on "business competition," and thus could not transform the defendants' otherwise "non-commercial" activities into "commercial" conduct.

Similar considerations guided this Court in concluding that state antitrust law should not apply to the civil rights boycott in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886

(1982). While recognizing that the defendants' interest in the boycott's outcome had economic overtones (*e.g.*, better jobs, fairer prices), such economic interests were not the type of economic interests at which the antitrust laws were directed:

> There is no suggestion that the NAACP . . . or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests.

Id. at 915. To the contrary, as this Court observed in *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990):

> Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. They were black citizens in Port Gibson, Mississippi, who had been the victims of political, social, and economic discrimination for many years. They sought only the equal respect and equal treatment to which they are constitutionally entitled. . . . Equality and freedom were preconditions of the free market, and not commodities to be haggled over within it.

Id. at 426. Thus, notwithstanding the economic benefits that would flow to its participants from a successful boycott in *Claiborne Hardware*, this Court determined that the foregoing factors "differentiated" the *Claiborne* boycott from a "boycott organized for economic ends." *Claiborne*, 458 U.S. at 915.

The Fourth Circuit's decision in this case flies in the face of this line of precedent by holding that benefits of an indirect, attenuated, or wholly non-economic character—having nothing to do with the "business competition" allegedly restrained—were enough to transform Historic Green Springs' "non-commercial" conduct into "commercial" conduct. In so holding, the Fourth Circuit saw two "commercial benefits" flowing to HGSI as a result of the

Grace Donations that neither this Court nor any other circuit court had previously deemed to be "commercial benefits."

First, the Fourth Circuit saw some "pecuniary gain" entailed in HGSI "receiving hundreds of acres of land." App. 11a. However, any "gain" to Historic Green Springs from the "land" or "mining rights" conveyed by the Grace Donations is wholly irrelevant as an antitrust matter. HGSI is not now—and never has been—a competitor of VVL or Grace. HGSI is indisputably a non-profit historic preservation organization, which, by the terms of its own charter, is not empowered to make any "arrangements" for its own "economic advantage," and which could not possibly profit from the use of such "mining rights" *qua* "mining rights." *See supra* at 6 ((Compl. ¶ 29) HGSI charter providing for pursuit of preservation goals "without pecuniary gain or profit to its members"). Thus, Historic Green Springs is no more a "business competitor" of plaintiff VVL than the anti-abortion groups in *Scheidler* were "business competitors" of the abortion clinics they sought to shut down, or the civil rights boycott participants in *Claiborne* were of the merchants they refused to patronize.[4] *Scheidler*, 968 F.2d at 621; *Claiborne*, 458 U.S. at 915.

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[4] Nor is this case like others that have come before the Court, where a nonprofit trade or professional association is alleged to have fixed prices for its members, *e.g., Goldfarb v. Virginia State Bar*, 423 U.S. 886 (1975) (minimum fee schedule for members); negotiated for-profit contracts on their behalf, *e.g., NCAA v. Board of Regents*, 468 U.S. 85 (1984); "exchange[d] money for services or the setting of a price," *United States v. Brown Univ.*, 5 F.3d 658, 667 (3d Cir. 1993); or otherwise sought some special advantage in connection with a commercial activity. Rather, this is a case of first impression for this Court in which a non-profit historic preservation organization is allegedly liable under the antitrust laws for having done what non-profit organizations do—solicit donations to further its charitable mission.

Second, the Fourth Circuit saw a benefit to HGSI from the Grace Donations because they purportedly "protected the alleged commercial interests of its management and members, which might be affected by mining of the land." App. 11a. However, this benefit is just as attenuated and imprecise as the nominal and largely speculative benefits that were rejected in *DELTA*, *NOW*, *Scheidler* and *Claiborne*. Just as the fact that the defendants in *NOW* and *Claiborne* might obtain better jobs if their boycott activities were successful politically did not make those activities "commercial," the fact that HGSI's members and officers might see the value of their own land holdings rise as an indirect result of their preservation efforts cannot make those efforts commercial.

Moreover, the fact that HGSI members might derive personal satisfaction from their historic preservation efforts, or find value in their historic surroundings, cannot convert this into an antitrust matter, just as the personal satisfaction of anti-abortion activists who drive an abortion clinic out of business does not implicate the antitrust laws. To be sure, HGSI members view the Green Springs area as degraded by strip-mining. But this does not convert their successful effort to protect the Landmark District into a commercial activity. "Not every aspect of life in the United States is to be reduced to such a single-minded vision of the ubiquity of commerce." *DELTA*, 50 F.3d at 714.

This last aspect of the Fourth Circuit's decision, like the two other issues discussed *supra*, promises to be a continuing source of confusion and inconsistent decisions among the lower federal courts. Given the prominent role non-profit organizations play in promoting social welfare and public interest goals, and the often deep pockets of their adversaries, leaving any of these three prongs of the Fourth Circuit's decision unreviewed may actively encourage the widespread use of Sherman Act claims to intimidate non-profit activist groups into curtailing their socially useful activities or force

them entirely out of existence. Thus, guidance as to the relationship between "commercial" and "non-commercial" conduct is plainly required, and this case provides an opportunity for this Court to speak to this important issue.

II. THE FOURTH CIRCUIT'S DECISION CREATES A CONFLICT BETWEEN SECTION 1 OF THE SHERMAN ACT AND THE HISTORIC STRUCTURES TAX ACT, AS CODIFIED IN SECTION 170(H) OF THE INTERNAL REVENUE CODE

The Fourth Circuit also failed to consider the conflict that its decision creates between the Sherman Act and various other federal statutes promoting historic preservation and conservation policies. The Fourth Circuit reached its decision that the Grace Donations were "essentially commercial" without attributing any significance to the fact that the Donations were alleged to have been made, at least in part, in conformity with the Historic Structures Tax Act, I.R.C. § 170(h). As a result, the Fourth Circuit's decision, unless reversed, will likely give rise to widespread confusion as to whether Section 1 of the Sherman Act limits or conditions the ability of commercial interests to make, and non-profit organizations to accept, donations of land in conformity with Section 170(h) of the Internal Revenue Code. Guidance from this Court on the relationship between these two statutory schemes is essential to the future of charitable land donations in this country.

The Complaint alleges that Grace donated entire or partial interests in Green Springs land to HGSI subject to an alleged agreement between Grace and Historic Green Springs that such land would be used exclusively for conservation or preservation purposes (*i.e.*, not for mining) and that, in return, Grace received a "sizeable tax deduction." (Compl. ¶ 25.) By way of example, Grace is alleged to have conveyed its interest in the A.D. Peers property to HGSI "subject to the unrecorded mining agreement between Grace and the former

owners," and "on the understanding and agreement that HGSI would not allow it to be mined for vermiculite or other substances." (Compl. ¶ 51.) Such a conveyance of a "qualified real property interest" to a "qualified organization," with conditions that ensure that the property will be used "exclusively for conservation purposes" accords perfectly with the definition of a "qualified conservation contribution" set forth in I.R.C. § 170(h).

The Fourth Circuit failed entirely to acknowledge the preservation policies served by and the requirements of I.R.C. § 170(h). Instead, it deemed subject to antitrust scrutiny the very act (*i.e.*, making a donation in conformity with Section 170(h)) that the Historic Structures Tax Act and related statutes expressly permitted and promoted. In so doing, the Fourth Circuit allowed the Sherman Act to unconditionally trump the competing policies of other federal statutes in a way that threatens to undermine both those statutes and the efforts of historic preservation and conservation groups nationwide.

A. The Historic Structures Tax Act And National Historic Preservation Policies

Since 1964, the Internal Revenue Code has allowed a charitable deduction for donations of land or easements on land to qualified non-profit organizations. I.R.C. § 170(h); Treas. Reg. § 1.170A. In 1976, Congress passed, as an amendment to the Tax Reform Act of 1976, the Historic Structures Tax Act. This amendment, which followed the lead set by the National Historic Preservation Act, 16 U.S.C. § 470, *et seq.*, provided express statutory authority for the deductibility of donations of land for historic preservation purposes. Stephen J. Small, *The Federal Tax Law of Conservation Easements* 1-1-3 (1993). In so providing, the federal tax laws placed the conservation of historically and environmentally significant land and buildings in a favored category, eligible for substantial tax benefits because of the important public interest in preserving and protecting unique

places like the Green Springs National Historic Landmark District.

The requirements for entitlement to a "qualified conservation contribution" tax deduction are stringent. The donation must be of a "qualified real property interest," which the Code defines to include "remainder interests" in land, "restriction[s] (granted in perpetuity) on the use which may be made of the real property," or, as in this case, "the entire interest of the donor other than a qualified mineral interest" in the donated land. I.R.C. § 170(h)(2)(A). The recipient of the donation must be a "qualified organization," which is defined generally as a Section 501(c)(3) entity otherwise qualified to accept tax-deductible charitable donations. *Id.* § 170(h)(3). Finally, the donation must be made "exclusively for conservation purposes." *Id.* § 170(h)(1)(C). Valid "conservation purposes" under the Code include the "preservation of land areas for outdoor recreation," the "preservation of open space . . . where such preservation is for the scenic enjoyment of the general public," and, most relevant here, the "preservation of an historically important land area or a certified historic structure," as determined by the Department of the Interior or the federal Advisory Council on Historic Preservation. *Id.* § 170(h)(4)(A)(i), (ii), (iii).

Most significantly, a donation will be deemed to have been made "exclusively for conservation purposes" only where (a) "the conservation purpose is protected in perpetuity;" and (b) if there has been a retention or reservation as to a "qualified mineral interest," either (i) the "extraction or removal of minerals by any surface mining method" has been expressly prohibited, or (ii) where the surface and mineral estates had previously been and remain separated, a determination has been made that "the probability of surface mining occurring on such property is so remote as to be negligible." *Id.* § 170(h)(5)(A)-(B).

B. The Fourth Circuit's Decision Creates A Conflict Between Two Federal Statutory Schemes By Failing To Address Whether Section 1 Of The Sherman Act Is Implicitly Repealed With Respect To Conduct Authorized Or Compelled By The Historic Structures Tax Act

It is in the context of these specific requirements for I.R.C. § 170(h) tax deductibility that the Grace Donations should have been—but were not—evaluated by the Fourth Circuit. Grace sought to make, and Historic Green Springs to accept, a series of donations of Grace's Louisa County land "exclusively for conservation purposes." Each of the conveyances from Grace to HGSI related, *inter alia*, to parcels with respect to which prior owners arguably shared with Grace control of the future "extraction or removal of minerals" by surface mining.[5] Pursuant to Section 170(h), Grace would be entitled to a deduction *only if* there were an express prohibition on mining—a requirement satisfied by the restrictive covenants in all but one of the instruments of conveyance—or, alternatively, if "the probability of surface mining occurring on such property [was] so remote as to be negligible." I.R.C. § 170(h)(5)(B). With respect to the one Grace Donation unaccompanied by a restrictive covenant, the requirement of a "negligible" likelihood of mining must here be presumed to be satisfied, given the Complaint's express allegation of an unwritten agreement that Historic Green Springs would not permit mining on the property (Compl. ¶ 51)—an allegation reinforced by the separate allegations that HGSI had, pursuant to its charter and past practice,

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[5] In suits consolidated with the VVL action below—and vigorously contested by Grace—members of the Peers families alleged that the original deeds conveying their property to Grace reserved to them a right of control over the "extraction" of vermiculite expansive enough to preclude Grace from donating this property to HGSI. *See* App. 12a-14a.

historically and uniformly opposed mining in and around the Landmark District. (*Id.* ¶¶ 29-33.)

The Fourth Circuit's utter failure to consider the tax purposes of the Grace Donations, or the federal policies served thereby, cannot go unreviewed. "Life in the United States" is not limited to the ambit of "trade and commerce," and where the federal government has adopted economic or social policies in those other areas that may conflict with free and open competition, accommodation must be made by the courts between the demands of the antitrust laws and the constraints of those other legislative goals and policies. *DELTA*, 50 F.3d at 714; *see* 2 American Bar Ass'n, Section on Antitrust Law, *Antitrust Law Developments (Fourth)* 1069 (1997). Such an accommodation can result in either a "reconciliation of the antitrust laws with [the] federal regulatory scheme" at issue, or a determination that the structure and integrity of the other federal statutes implies a repeal of the antitrust laws insofar as they apply to the same conduct. *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 660 (1975).

The Fourth Circuit never conducted such an analysis, so its decision left unanswered the question of whether the Historic Structures Tax Act implicitly repeals Sherman Act § 1 insofar as it applies to donations of land made for preservation purposes. While "implied antitrust immunity is not favored," *United States v. NASD*, 422 U.S. 694, 719 (1975), the legislative history of Section 170(h), the roles played by the Internal Revenue Service ("IRS"), the federal Advisory Council on Historic Preservation, the Secretary of the Interior, and other federal agencies in monitoring the use of Section 170(h), and the role of Section 170(h) in an overall national conservation and preservation policy all strongly suggest that there is the requisite "plain repugnancy" between Section 170(h) and Sherman Act § 1, to compel the conclusion that Section 170(h) implicitly repeals Sherman Act § 1 in this narrow sphere. *Gordon*, 422 U.S. at 682;

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963). Indeed, if the antitrust laws can be used routinely to invalidate conservation and easement donations, then repeal of Sherman Act § 1 must be implied because it is "necessary" to make the national historic preservation policies implemented by Section 170(h) "work." *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

C. For Purposes Of "Qualified Conservation Contributions," The Historic Structures Tax Act Implicitly Repealed Section 1 Of The Sherman Act

In evaluating whether conduct sanctioned by other Federal statutes should be immune from antitrust scrutiny, this Court has generally looked—as the Fourth Circuit did not do here—to three factors: (1) the existence of a regulatory scheme directly addressing the conduct at issue; (2) the actual exercise of supervisory power by a federal agency under such a scheme; and (3) the validity of other goals and policies served by the competing regulatory scheme. *See National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378 (1981).

Here, all three criteria are plainly satisfied. *First*, there is a competing regulatory scheme that authorizes and, indeed, encourages the very conduct found unlawful by the Fourth Circuit. The Historic Structures Tax Act, taken together with the National Historic Preservation Act and related historic preservation statutes, embody a comprehensive scheme of federal regulation targeted at encouraging the preservation of our national heritage. When introducing the Historic Sites Tax Act, Senator Beall, the Act's sponsor, acknowledged and reaffirmed these congressional goals by stating that the Act was intended to "harness the constructive aspects of our Federal tax system so as to preserve historically significant buildings . . . and increase the development of additional open spaces for public use." Statement of Senator Beall, 120 Cong. Rec. 3004 (Feb. 12, 1975).

Reflected in this statement of Congressional intent was a recognition that "economic factors generally determine the fate of . . . privately owned historic structures," and that "the opportunity for greater gain," either through redevelopment or tax benefits previously available to offset demolition costs, often "compels the owner of an historic structure to undertake its replacement." *The Environmental Protection Tax Act and the Historic Structures Tax Act, An Analysis for the Advisory Council on Historic Preservation*, 120 Cong. Rec. 3005, 3006 (Feb. 12, 1975). To remedy this problem, Congress chose to intervene in the interplay of relevant "economic factors" with legislation that would "remove tax-generated pressures" for the replacement of historic structures and the development of open spaces, and would instead provide "positive incentives for private action that furthers the objectives" of historic preservation and conservation. Thus, Congress implicitly determined to preempt the antitrust laws in this area by affirmatively providing that considerations other than the forces of the marketplace—the usual bailiwick of the antitrust laws—should play the predominant role in the future of historic structures and districts.

Second, practice under Section 170(h) bears out Congress's intent by evidencing extensive supervisory involvement in the statute's use by federal agencies "empowered to authorize or require the type of conduct under antitrust challenge." *National Gerimedical Hosp.*, 452 U.S. at 389. Indeed, the IRS, by the very terms of the statute, has the power to authorize taxpayers to make "qualified conservation contributions," and when they do, to require that they be made upon the conditions (*i.e.*, "exclusively for conservation purposes") challenged as violative of Sherman Act § 1 in this case. The IRS also has the power to audit any deduction claimed pursuant to Section 170(h), and in the context of historic preservation donations, can, in turn, only approve donations made to preserve "certified historic structures" or "registered historic districts" designated by the

federal Advisory Council on Historic Preservation or the Secretary of the Interior. This oversight ensures that such donations validly serve Congressional policy goals, and strongly suggests that allowing antitrust claims to be maintained with respect to conduct sanctioned by the IRS and other federal agencies would frustrate entirely the statute's aims.

Finally, both the legislative history and history of practice under Section 170(h) demonstrate that the competing regulatory scheme at issue here has to date served, and should continue to serve, important public interests that are separate from but coequal with "business competition." As this Court recognized in *Gordon*, while "the sole aim of antitrust legislation is to protect competition," other statutes protect and promote equally legitimate aims. 422 U.S. at 689. In *Gordon*, the interests served (and respected by this Court) were the "economic health of the investors, the exchanges, and the securities industry." *Id.* Here, the interests served are "preservation" of "the Nation's history" and the "fabric of our communities," goals which Congress has entrusted to the IRS, the Advisory Council, and the Department of the Interior. 120 Cong. Rec. 3004. Given the "expertise" of these agencies with respect to these issues, the "confidence" that Congress has placed in them, and the active role they and Congress have taken, it is just as likely here as it was in *Gordon* that "permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme." *Gordon*, 422 U.S. at 689-90.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted. If not now reviewed, the Fourth Circuit's decision will allow VVL to achieve its actual purpose in bringing this action: Historic Green Springs will be driven out of existence by the immense costs of defending an antitrust suit and the related threat of treble damages. The Court must not permit such a patently improper use of the antitrust laws to halt HGSI's federally-sanctioned preservation efforts, or, as a necessary corollary, allow numerous successor suits to have a chilling effect on land conservation and historic preservation endeavors nationwide.

RESPECTFULLY SUBMITTED,

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FEBRUARY 10, 1999

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

VIRGINIA VERMICULITE, LIMITED, *Plaintiff-Appellant*,

and

M.F. PEERS, JR.; NORMA PEERS, *Plaintiffs*,

v.

W.R. GRACE & COMPANY –CONNECTICUT,
Defendant-Appellee.

No. 97-1698

M.F. PEERS, JR.; NORMA PEERS;
VIRGINIA VERMICULITE, LIMITED, *Plaintiffs-Appellants*,

v.

W.R. GRACE & COMPANY –CONNECTICUT,
Defendant-Appellee.

No. 97-1699

VIRGINIA VERMICULITE, LIMITED, *Plaintiff-Appellant*,

v.

W.R. GRACE & COMPANY –CONNECTICUT;
THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendant-Appellees.

NATIONAL TRUST FOR HISTORIC PRESERVATION;
THE LAND TRUST ALLIANCE, *Amici Curiae*.

No. 97-1807

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Senior District Judge. (CA-96-12-3-C, CA-96-13-3-C, CA-95-15-3-C)

Argued: December 4, 1997

Decided: September 1, 1998

Before LUTTIG and WILLIAMS, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.*

Reversed and remanded by published opinion. Judge Luttig wrote the opinion, in which Judge Williams joined.

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*Senior Judge Merhige participated in the hearing of this case at oral argument but retired before the decision was filed. The decision is filed by a quorum of the panel. *See* 42 U.S.C. § 46(a).

COUNSEL

ARGUED: Einer Richard Elhauge, HARVARD LAW SCHOOL, Cambridge, Massachusetts, for Appellants. Charles Hubert Montange, Seattle, Washington; Randolph S. Sherman, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, New York, New York, for Appellees. **ON BRIEF**: David Z. Izakowitz, Jane Champion Clarke, WOODS, ROGERS & HAZLEGROVE, P.L.C., Charlottesville, Virginia, for Appellant Virginia Vermiculite; Roger S. Martin, MARTIN & WOODARD, P.L.C., Charlottesville, Virginia, for Appellants Peers. David S. Copeland, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, New York, New York; Thomas E. Albro, Patricia D. McGraw, TREMBLAY & SMITH, Charlottesville, Virginia, for Appellee W.R. Grace.

OPINION

LUTTIG, Circuit Judge:

Plaintiffs Virginia Vermiculite, Limited and M.F. Peers, Jr. and Norma Peers appeal from the district court's dismissal of their claims against defendants W.R. Grace & Company and Historic Green Springs, Incorporated, brought under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Virginia law. Reviewing the district court's dismissal *de novo*, *Chisolm* v. *TranSouth Financial Corp.*, 95 F.3d 331, 334 (4th Cir. 1996), we reverse.

I.

Appellant Virginia Vermiculite, Limited ("VVL") and appellee W.R. Grace & Company ("Grace") are the only domestic producers of vermiculite, a unique mineral used in fire safety, energy conservation, construction, environmental protection, food processing, and horticulture. Appellee Historic Green Springs, Incorporated ("HGSI") is a nonprofit organization that seeks to protect the Green Springs National

Historic Landmark District in western Virginia. For approximately twenty years, HGSI has conducted a campaign to prevent vermiculite mining in the Green Springs region. Appellants Peerses are family members who sold land containing vermiculite deposits to Grace, subject to royalty agreements.

Vermiculite is a relatively rare mineral. Only two states, South Carolina and Virginia, have known and usable vermiculite reserves. Grace mines vermiculite only in South Carolina; VVL, only in Virginia. Until 1976, Grace was the sole producer of vermiculite in the United States. From 1972 to 1976, Grace purchased mining rights to over 80% of the known vermiculite deposits in Virginia. Grace acquired some of this land from members of the Peers family, including appellants Peerses, in return for a lump sum and royalties on any vermiculite mined from the land. In exchange for these royalties, the Peerses agreed in writing that Grace, and its successors in interest, would retain "sole discretion" over whether to mine the land. Grace, however, never mined any of its Virginia deposits and consequently did not pay the Peerses any royalties.

In 1976, VVL entered the vermiculite market by obtaining rights to one of the few Virginia deposits not already held by Grace. By the early 1990s, VVL's share of the domestic vermiculite market had grown to approximately 23%. Grace, however, owned more than 80% of the mining rights to known vermiculite deposits in the United States, while VVL was rapidly depleting the deposits to which it had access.

In 1991, Grace invited VVL to make an offer to purchase Grace's vermiculite holdings in Virginia. VVL duly made an offer, which was rejected by Grace. Grace thereafter donated its holdings to HGSI. These holdings, comprising over 40% of the known vermiculite deposits in the United States, covered almost 1400 acres of land located in and around the Green Springs region. VVL alleges that the purpose of the

donation was to prevent VVL from obtaining access to the vermiculite deposits on the land.

Grace made its donation in two parts. In 1992, Grace conveyed 1152 acres to HGSI, accompanied with restrictive covenants barring vermiculite mining on the land. Although the covenants bound HGSI and its successors in interest, Grace retained the right to waive them. However, a Virginia court subsequently struck down one of these covenants. *See HGSI* v. *Brandy Farm, Ltd.*, 32 Va. Cir. 98, 102-03 (Louisa Cty. 1993), *petition refused*, No. CH-4872 (Va. June 20, 1994). Consequently, when Grace transferred the final 229 acres to HGSI in 1994, it omitted any similar covenants. VVL alleges, however, that Grace executed this second part of the donation on the unwritten understanding that HGSI would not allow vermiculite mining on the land.

As a result of this donation, on February 21, 1995, VVL brought suit against Grace and HGSI ("the VVL suit"). VVL's complaint included six counts. Count I alleged that Grace and HGSI entered into an agreement, combination, or conspiracy in restraint of trade in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Count II alleged that Grace engaged in monopolization in violation of section 2 of the Sherman Act, *id.* § 2. Count III alleged that Grace attempted to engage in monopolization, also in violation of section 2. Count IV alleged that Grace and HGSI entered into a conspiracy to monopolize, again in violation of section 2. Count V alleged that Grace and HGSI violated analogous provisions of the Virginia Antitrust Act, Va. Code §§ 59.1-9.1 to 59.1-9.18. Count VI alleged that Grace and HGSI engaged in a conspiracy to injure another in trade, business, or profession, in violation of Virginia law, *id.* § 18.2-499.

On March 12, 1996, VVL, which had obtained interests in the claims of various members of the Peers family, and appellants Peerses brought two additional lawsuits against Grace ("the Peers suits"). The two suits included essentially identical counts. Counts I to V alleged that Grace's donation

of the land sold to it by the Peerses violated various state laws. Count VI alleged that the donation violated section 1 of the Sherman Act.

The district court referred all of these suits to a magistrate judge, and, on September 19, 1995, the magistrate recommended dismissing Counts I, II, and III of the VVL suit for failure to state a claim, Fed. R. Civ. P. 12(b)(6), and dismissing Counts V and VI for want of jurisdiction, 28 U.S.C. § 1367(c). On September 19, 1996, the magistrate recommended dismissing the Peers suits in their entirety on similar grounds.

The district court adopted the magistrate's recommendations in part. 965 F. Supp. 802 (W.D. Va. 1997). First, the district court concluded that VVL and the Peerses had failed to state a claim for an agreement, combination, or conspiracy in restraint of trade under section 1 of the Sherman Act. *Id.* at 819-21. Consequently, it dismissed Count I of the VVL suit, Count V of the same suit to the extent that it relied on the same theory, and Count VI of the Peers suits. *Id.* at 821. Second, the district court held that HGSI was entitled to an exemption from the antitrust laws. *Id.* at 813. It thus dismissed HGSI from the VVL suit entirely. *Id.* at 818. Third, the district court concluded that VVL and the Peerses had failed to state a claim under Virginia law in the Peers suits. *Id.* at 829-32. Therefore, it dismissed the remainder of those suits. *Id.* VVL and the Peerses subsequently brought this consolidated appeal, challenging all three rulings.

II.

Appellants first assert that the district court erred in finding that they failed to state a claim under section 1 of the Sherman Act. We agree.

The district court dismissed appellants' section 1 claims on the ground that appellants failed to demonstrate a sufficient causal relationship between their alleged injury and appellees' alleged violation of the antitrust laws. 965 F. Supp.

at 819. Specifically, the court reasoned that any injury to appellants was unavoidable because HGSI, or its successors in interest, would not have allowed vermiculite mining on the donated lands even absent the nonmining agreements between HGSI and Grace. *Id.* at 820. This reasoning is faulty for two reasons.

First, appellants sufficiently alleged that HGSI, or its successors in interest, might eventually have allowed vermiculite mining on the donated lands in the absence of the nonmining agreements. In this regard, of course, appellants need only make a "colorable" showing that it was "reasonably probable" that the behavior in question caused their injury. *Advanced Health-Care Servs., Inc.* v. *Radford Community Hosp.*, 910 F.2d 139, 149 (4th Cir. 1990). Such a low standard is particularly justified in this context because "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co.* v. *Trustees of the Rex Hosp.*, 425 U.S. 738, 746 (1976) (quoting *Poller* v. *CBS*, 368 U.S. 464, 473 (1962)) (citation omitted).

Appellants meet this standard. VVL acknowledged in its complaint that eliminating vermiculite mining was "one of HGSI's avowed goals." J.A. at 575. It also claimed, however, both that HGSI had other goals and that its management and members had financial interests of their own in the land in question. *Id.* By alleging that HGSI had goals beyond eliminating vermiculite mining and that its management and members individually had financial interests in the land in question, appellants sufficiently raised the specter either of possible mining by HGSI or its agents or of sale of the land to another for mining. As appellants observe, it is not at all implausible that HGSI might have chosen to mine the reserves in order to pursue other of its goals or even to preserve its financial stability. Indeed, appellants represent that HGSI has already sold some of the land. *See* Br. of

Appellants at 40. The fact that the parties saw the need to enter into the nonmining agreements at all yet further supports the inference that HGSI had other goals beyond preservation, as the nonmining agreements would have been superfluous to the donation were HGSI committed solely to the elimination of mining.

Second, the district court simply misconstrued the nature of appellants' section 1 allegations. Rather than asserting that the nonmining agreements *alone* constituted an agreement, combination, or conspiracy in violation of section 1, both VVL and the Peerses alleged that the *entire* transaction between Grace and HGSI – comprising both the donation of the lands and the nonmining agreements – constituted such an agreement, combination, or conspiracy. *See* J.A. at 575–76 (VVL complaint); *id.* at 129, 141 (Peers complaints). Consequently, the relevant question for causal purposes is not whether HGSI would have allowed mining in the absence of the nonmining agreements, but rather whether *Grace* would have allowed mining in the absence of *both* the donation and the nonmining agreements. Absent its transaction with HGSI, Grace may even have been *required* to grant VVL access to its Virginia holdings, on the ground that failure to do so would constitute an improper unilateral refusal to deal. *See Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992). Further, even if Grace lawfully could have donated the lands to HGSI without the nonmining agreements, it is foreclosed from challenging causation simply on the basis that it could have achieved the same result through lawful means. *See Lee–Moore Oil Co.* v. *Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir. 1979) (holding that, when an antitrust plaintiff alleged damages resulting from the defendant's concerted refusal to deal, "the fact that [the defendant] might have caused the same damages by a lawful [unilateral] cancellation of the contract is irrelevant").

For these reasons, the district court erred in dismissing appellants' section 1 claims.[1]

III.

Appellants next argue that the district court erred in dismissing their claims against HGSI. We agree.

The district court dismissed appellants' claims against HGSI on the ground that HGSI is exempt from the antitrust laws because it is a nonprofit organization pursuing noncommercial, sociopolitical objectives. 965 F. Supp. at 815. We hold that, regardless of whether an "exemption" for nonprofit organizations exists, HGSI does not qualify for such an exemption here because the transaction between HGSI and Grace was fundamentally commercial.

Section 1 of the Sherman Act includes no reference to an exemption for nonprofit organizations, stating instead that "[e]very person" who acts in restraint of trade or commerce falls within its scope. 15 U.S.C. § 1. In interpreting section 1, the Supreme Court has repeatedly confirmed that nonprofit organizations are not exempt from the section's reach. *See NCAA* v. *Board of Regents*, 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities, and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct." (citations omitted)); *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) ("[I]t is beyond debate that nonprofit

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[1] Grace argues that the Peerses lack standing to assert antitrust claims against it. Whether the Peerses have antitrust standing turns primarily on whether their injuries are direct or indirect, an inquiry that in turn depends on whether other, more directly affected parties exist. *See, e.g., Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 541-42 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977). Because the Peerses directly supplied mining rights to Grace, with no intervening party more directly implicated, we hold that they do have standing.

organizations can be held liable under the antitrust laws."); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 786-87 (1975) ("We cannot find support for the proposition that Congress intended any such sweeping exclusion.").

A number of our sister circuits have held that, in certain circumstances, nonprofit organizations are not subject to antitrust liability. *See, e.g., Dedication and Everlasting Love to Animals* v. *Humane Soc'y*, 50 F.3d 710, 712 (9th Cir. 1995) (refusing to apply antitrust laws to solicitation of contributions by charity); *Marjorie Webster Junior College, Inc.* v. *Middle States Ass'n of Colleges and Secondary Sch., Inc.*, 432 F.2d 650, 654-55 (D.C. Cir. 1970) (likewise for accreditation of educational institution by regional association). When these cases are examined closely, however, this seeming "exemption" is not really an exemption at all, but a straightforward interpretation of the plain language of section 1, which prohibits only restraints of "trade or commerce," not noncommercial behavior. *See, e.g., United States* v. *Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993) (applying antitrust laws to nonprofit universities on the ground that payment of tuition in return for education constitutes "quintessential commercial transaction," with classification of transaction as commercial based on "totality of surrounding circumstances"); *cf. NOW* v. *Scheidler*, 968 F.2d 612, 622-23 (7th Cir. 1992) (refusing to apply antitrust laws to abortion protests even though defendants were not nonprofit organizations, on ground that behavior was noncommercial).

Regardless of how the "exemption" for nonprofit organizations engaging in noncommercial behavior is characterized, however, HGSI is subject to the antitrust laws in this case because the transaction between HGSI and Grace was essentially commercial. We emphasize that the dispositive inquiry is whether the *transaction* is commercial, not whether the *entity* engaging in the transaction is commercial. Ample evidence suggests the commercial nature

of the transaction here. First, as the district court recognized, the transaction between HGSI and Grace had obvious effects on the commercial market for vermiculite: by constraining the supply of vermiculite, the transaction increased the price of the mineral. 965 F. Supp. at 815. Further, as the district court also acknowledged, the transaction had direct commercial benefits for HGSI itself: by receiving hundreds of acres of land, HGSI not only realized a substantial "pecuniary gain," *id.* at 809, but also protected the alleged commercial interests of its management and members, which might be affected by mining of the land, J.A. at 575.

Even were we to hold that HGSI was somehow "exempt" from the antitrust laws by virtue of being a nonprofit organization, the Supreme Court has held, in the context of other exemptions, that an organization that would otherwise be exempt from the antitrust laws loses its exemption by conspiring with a nonexempt party. *See Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 809-10 (1945) (labor exemption); *United States* v. *Borden Co.*, 308 U.S. 188, 204-05 (1939) (agriculture exemption). Moreover, it is not necessary that HGSI have shared Grace's alleged anticompetitive motive in entering into a proscribed restraint; it is sufficient that HGSI, regardless of its own motive, merely acquiesced in the restraint with the knowledge that it would have anticompetitive effects. *See Hydrolevel*, 456 U.S. at 573-74 (holding nonprofit organization liable regardless of whether its agents acted with intent to benefit organization, provided restraint had anticompetitive effects); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948) ("[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."); *Duplan Corp.* v. *Deering Milliken Inc.*, 594 F.2d 979, 982 (4th Cir. 1979) (per curiam) ("Where, as here, the [defendants] were knowing participants in a scheme whose effect was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial."). In assessing whether HGSI is

subject to the antitrust laws for its participation in the transaction with Grace, the only relevant inquiry is into the nature of the transaction, not the nature of HGSI's motive. Because the transaction at issue in this case was fundamentally commercial, the district court erred in dismissing HGSI as a defendant.[2]

IV.

Finally, appellants argue that the district court erred in finding that they failed to state a claim under Virginia state law in the Peers suits. Again, we agree.

The district court rested its dismissal of appellants' state law claims primarily on its interpretation of the provision in the contract between the Peerses and Grace that vested Grace with "sole discretion" to decide whether to mine the land. 965 F. Supp. at 831-32. It ruled that Grace had no implicit contractual duty under state law to use good faith in exercising its discretion as to whether to mine. *Id.* at 831. Not only was this ruling incorrect as a matter of standard contract law, but it also failed to take into consideration a prior Virginia case ruling on a virtually identical contract.

First, it is a basic principle of contract law in Virginia, as elsewhere, that although the duty of good faith does not

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[2] In its brief, *see* Br. of Appellee HGSI at 23-25, HGSI makes the related, but discrete, argument that it should be immune from antitrust liability because its conduct in entering into the transaction with Grace was protected by the First Amendment, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-15 (1982) (holding that politically motivated boycott was not subject to antitrust laws). We reject this argument for two reasons. First, HGSI simply does not identify any "speech" that would be restricted if HGSI were subject to the antitrust laws. Second, the Supreme Court has since limited its reasoning in Claiborne to cases in which the defendant is financially disinterested. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425-28 (1990). As we noted above, *see supra* Part II, appellants have sufficiently alleged that HGSI was financially interested in the transaction with Grace.

prevent a party from exercising its explicit contractual rights, a party may not exercise contractual *discretion* in bad faith, even when such discretion is vested solely in that party. *See* Steven J. Burton & Eric G. Anderson, *Contractual Good Faith* 46-47 (1995) ("The courts could leave all discretion in performance unbridled. . . . No U.S. court now takes this approach . . . . Thus, contractual discretion is presumptively bridled by the law of contracts – by the covenant of good faith implied in every contract."). Neither of the cases on which the district court relied is inconsistent with this rule. *See Charles E. Brauer Co.* v. *NationsBank*, 251 Va. 28, 35 (1996) (holding that exercise of explicit contractual *right* by bank against debtor was not bounded by good faith); *Mahoney* v. *NationsBank*, 249 Va. 216, 219-21 (1995) (same).

Second, the Virginia courts have already ruled, in earlier litigation involving a conveyance of vermiculite mining rights to Grace and a donation of those rights from Grace to HGSI, that a nearly identical contractual provision carries with it an implicit duty of good faith. *Brandy*, 32 Va. Cir. at 102. In *Brandy*, as here, a private landowner conveyed mining rights to Grace in return for a lump sum and royalty payments.[3] *Id.* at 98-99. The landowner, again as here, agreed in writing that Grace would retain "sole discretion" over whether to mine the property. *Id.* at 101. The court in *Brandy* concluded that such a provision entailed an implicit duty of good faith. *Id.* at 102 ("[T]he implied duty of good faith is particularly important in the context of mining leases, where the landowners must necessarily leave the decision-making

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[3] Grace argues that *Brandy* should be distinguished because the transaction at issue involved a lease, rather than a sale, of land. *See* Br. of Appellee Grace at 21. We find this distinction unpersuasive. Indeed, the argument for implying a duty of good faith may even be stronger in the latter case, because the original landowner in the former case could at least choose not to renew the lease were it unsatisfied with how Grace had exercised its discretion.

process to the expertise of mining companies."). Moreover, the court held that Grace's donation of the rights at issue to HGSI constituted a breach of that duty. *Id.* at 102-03.

In predicting how the Virginia courts would construe this contractual provision, we refuse to presume either that they would deviate from a fundamental premise of contract law or that they would change their minds so soon after interpreting a nearly identical provision in a nearly identical context. Accordingly, we hold that the district court erred in dismissing appellants' state law claims.[4]

CONCLUSION

The judgment of the district court is reversed, and the case remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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[4] Because we hold that appellants have sufficiently alleged that Grace breached its implicit contractual duty to act in good faith, we express no view on appellants' theory that Grace also violated the explicit terms of the contract by entering into the nonmining agreements with HGSI. *See* Br. of Appellants at 30-31.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 13, 1998

No. 97-1698
CA-96-12-3-C

VIRGINIA VERMICULITE, LIMITED Plaintiff - Appellant

and

M. F. PEERS, JR.; NORMA PEERS, Plaintiffs

v.

W.R. GRACE & COMPANY - CONNECTICUT,
Defendant - Appellee

No. 97-1699
CA-96-13-3-C

M. F. PEERS, JR.; NORMA PEERS; VIRGINIA
VERMICULITE, LIMITED, Plaintiffs - Appellants

v.

W.R. GRACE & COMPANY - CONNECTICUT,
Defendant - Appellee

No. 97-1807
CA-95-15-3-C

VIRGINIA VERMICULITE, LIMITED, Plaintiff - Appellant

v.

W.R. GRACE & COMPANY - CONNECTICUT;
THE HISTORIC GREEN SPRINGS, INCORPORATED,
Defendants - Appellees

NATIONAL TRUST FOR HISTORIC PRESERVATION;
THE LAND TRUST ALLIANCE. Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

VIRGINIA VERMICULITE, LTD., Plaintiff,

v.

W.R. GRACE & CO.-CONN.,
THE HISTORIC GREEN SPRINGS, INC., Defendants.

CIVIL ACTION NO. 95-0015-C

VIRGINIA VERMICULITE, LTD., Plaintiff,

v.

W.R. GRACE & CO.-CONN., Defendant.

CIVIL ACTION NO. 96-0012-C

M.F. PEERS, JR. & NORMA PEERS,
VIRGINIA VERMICULITE, LTD., Plaintiffs,

v.

W.R. GRACE & CO.-CONN., Defendant.

CIVIL ACTION NO. 96-0013-C

ORDER
JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDER

as follows:

(1) The Historic Green Springs, Inc. shall be, and it hereby is, dismissed as a defendant from Civil Action No. 95-0015-C.

(2) Count I and Count V (only insofar as it alleges a claim under Va. Code § 59.1-9.5) shall be, and they hereby are, dismissed from Civil Action No. 95-0015-C.

(3) Civil Action No. 96-0012-C and Civil Action No. 96-0013-C shall be, and they hereby are, dismissed and stricken from the docket of the court.

(4) Counts II, III, IV, V (only insofar as it alleges a claim under Va. Code § 59.1-9.6) and VI in Civil Action No. 95-0015-C shall remain against W.R. Grace & Co.-Conn.

(5) To the extent the Magistrate's Reports and Recommendations of September 19, 1995 and September 19, 1996 are inconsistent with the court's Memorandum Opinion

and this Order, the Reports shall be, and they hereby are, overruled.

(6) So much as remains of Civil Action No. 95-0015-C shall be, and it hereby is, remanded to the Magistrate Judge for proceedings consistent with the court's Memorandum Opinion and this Order.

The Clerk of the Court is hereby directed to send a certified copy of this Order and accompanying Memorandum Opinion to all counsel of record and to United States Magistrate Judge B. Waugh Crigler.

ENTERED: /s/ James H. Michael, Jr.
United States District Judge

Arpil 22, 1997
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

VIRGINIA VERMICULITE, LTD., Plaintiff,

v.

W.R. GRACE & CO.-CONN.,
THE HISTORIC GREEN SPRINGS, INC., Defendants.

CIVIL ACTION NO. 95-0015-C

VIRGINIA VERMICULITE, LTD., Plaintiff,

v.

W.R. GRACE & CO.-CONN., Defendant.

CIVIL ACTION NO. 96-0012-C

M.F. PEERS, JR. & NORMA PEERS,
VIRGINIA VERMICULITE, LTD., Plaintiffs,

v.

W.R. GRACE & CO.-CONN.,Defendant.

CIVIL ACTION NO. 96-0013-C

MEMORANDUM OPINION
JUDGE JAMES H. MICHAEL, JR.

This case comes to the court pursuant to 28 U.S.C. § 636(b)(1) on objections to United States Magistrate Judge B. Waugh Crigler's Reports and Recommendations, the first issued on September 19, 1995, and the second issued on September 19, 1996, in the above-captioned cases. Also, before the court is a motion to amend one of the complaints, filed on October 18, 1996. Because the three above-captioned cases are closely related, the court will resolve all outstanding issues in a single opinion.

I. MOTION TO AMEND COMPLAINT

Plaintiff Virginia Vermiculite, LTD. ("VVL") moves the court to permit it to amend its First Amended Complaint. Defendant W.R. Grace & Co.-Conn. ("Grace") does not object; Defendant The Historic Green Springs, Inc. ("HGSI"), however, opposes the motion to amend, if only tepidly so. *See* Transcript of January 31, 1997 Hearing at 6-7.

Fed. R. Civ. P. 15(a) directs that "leave [to amend a complaint] shall be freely given when justice so requires." According to its own statement Grace will suffer no prejudice from the amendment. As will become clear from the discussion below, neither will HGSI be prejudiced by an amendment. Meanwhile, VVL's amendment removes

allegations that no longer hold true and adds relevant allegations not made in its earlier complaints. The court sees no reason--given Grace's acquiescence--to analyze the case on an outdated complaint. Therefore, the court will grant VVL's motion to amend.

II. BACKGROUND

The court is presented with the novel argument that the federal antitrust laws require nullification of a donation to a nonprofit preservation organization. Attacking the donation are the donor's business competitor and two landowners who entered into a contract with the donor. The subject of the donation and the substance around which these peculiar cases revolve is a substance called vermiculite. "Vermiculite is a unique mineral in that it is fireproof and rapidly expands approximately tenfold in volume when heated to produce a low-density material. Vermiculite has valuable uses throughout the United States in fire safety, energy conservation, construction, environmental products, food processing and horticulture. Vermiculite also has promising new applications including detoxification of water and soil, nuclear waste containment and removal, and industrial spill containment and cleanup." Second Amended and Supplemental Complaint ("Second Amended Complaint") ¶ 10, *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, No. 95-0015-C (October 18, 1996). Vermiculite is obtained through mining; after it is removed from the ground, it must be taken to a processing plant (relatively close to the mining site) and separated from the rock, dirt, and clay in which it is embedded. *Id.* ¶ 11. In the United States, vermiculite is currently mined in South Carolina and Virginia, the only two states where substantial vermiculite reserves are known to exist, other than Montana, whose deposits are believed to be contaminated. *Id.* ¶¶ 16, 17. A significant portion of vermiculite is also obtained from South Africa; for instance, in 1992, approximately eighteen percent of all vermiculite sold in the United States was imported from South Africa. *Id.*

¶ 19. In the past, however, foreign exporters of vermiculite have not responded to fluctuations in vermiculite price in the United States. *Id.* ¶ 21.

VVL, a Virginia limited partnership, mines and sells vermiculite; hence, it is a consumer of vermiculite mining rights and a producer of vermiculite concentrates. *Id.* ¶ 63. It has been involved in vermiculite mining in Louisa County, Virginia since 1976. *Id.* ¶¶ 4, 13. VVL sells a substantial percentage of all vermiculite sold in the United States; in 1992, its share of the market was approximately twenty-three percent of all sales. *Id.* ¶ 19. Its only formidable domestic competitor is Grace, a Connecticut corporation; in 1992, Grace owned more than eighty percent of vermiculite mining rights (in Louisa County, Virginia and South Carolina) and was responsible for approximately fifty-seven percent of all vermiculite sold in the United States. *Id.* ¶¶ 5, 19, 26. Until 1990, Grace mined vermiculite in South Carolina and Montana only, even though it owned vermiculite mining rights in Louisa County; after 1990, Grace abandoned the mines in Montana, apparently because of the contamination, but continued mining in South Carolina. *Id.* ¶¶ 14, 15, 17.

In 1991, Grace invited VVL to make an offer to purchase all of Grace's holdings in Louisa County. *Id.* ¶ 23. VVL submitted an offer, which Grace rejected.[1] *Id.* ¶ 24. Instead of making a counter-offer, Grace donated its holdings to a nonprofit Virginia corporation, HGSI. *Id.* ¶¶ 6, 25, 37, 38, 43, 44, 51, 53. Grace's "compensation" for the donation came from the Internal Revenue Service in the form of a hefty tax deduction. *Id.* ¶ 25. For HGSI, the benefit of the donation exceeded the simple pecuniary gain of land and mining rights.

Since the early 1970s, HGSI's stated purpose has been to halt all vermiculite mining and other land development that

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[1] Although VVL speculates in its memoranda that the offer was a sham, its complaint contains no such allegation.

adversely impacts land (values) in Louisa County, Virginia. *Id.* ¶¶ 29, 32, 33, 34, 35. Indeed, for some twenty years, HGSI has fought to acquire vermiculite mining rights and has "conducted a campaign" against Grace to persuade Grace to surrender its mining rights in Louisa County to HGSI. *Id.* ¶ 36. HGSI's corporate charter announces its purpose as follows:

> [HGSI] is organized for charitable and educational purposes: to maintain and protect the beautiful and historic Green Springs area[, a designated national historic landmark,] as an important heritage for the State of Virginia and her people, without pecuniary gain or profit to its members or to any private individual and not to engage in a regular business of a kind ordinarily carried on for profit. Its purposes shall include historical and ecological research and education; the development of a community land-use plan to eliminate blight and prevent future deterioration; rendering assistance to like oriented organizations (historical and environmental).

Id. ¶¶ 29, 30.

Grace's first donation to HGSI, made in 1992, was accompanied by restrictive covenants imposed to "run with the land and be binding upon [HGSI] and upon all persons, firms, partnerships, corporations, limited liability companies, and all other legal entities of any type owning all or any part of the Real Estate." *Id.* ¶ 43. The covenant further directed that HGSI "agrees for itself and all of its successors in title or interest, and its assigns, that the Restrictive Covenants shall run with the land." *Id.* The Restrictive Covenants prohibited any part of the land ever to "be used or operated for the purpose of Mining or Mineral Production," *id.*, without regard to the possibility of successful reclamation. *Id.*

As a result of an unsuccessful suit HGSI brought to prevent mining by VVL--which owned mining rights to a property adjoining one of the 1992 conveyances to HGSI--the restrictive covenants were found by a Virginia state court to have breached the implied covenant of good faith. *Id.* ¶¶ 44-

49. After the state court ruling invalidated these restrictive covenants, Grace made another donation to HGSI in 1994, this time without a recorded restriction on mining. *Id.* ¶¶ 49, 51. The restrictions contained in the 1992 conveyances were subsequently narrowed by the parties to prohibit only vermiculite mining as opposed to all mining. *Id.* ¶¶ 53, 55.

As a consequence of the 1992 and 1994 transactions, VVL brought suit against Grace and HGSI on February 21, 1995. At the Magistrate's request,[2] on May 31, 1995, VVL filed its First Amended Complaint. Because the court has granted VVL's motion to amend this complaint, now before the court is VVL's Second Amended Complaint. VVL believes it has been injured both as a consumer (of mining rights) and a producer (of vermiculite concentrate) by the contract between Grace and HGSI which VVL claims to have resulted in the suppression of eighty percent of the vermiculite supply in Louisa County and forty percent of the vermiculite supply in the United States. *Id.* ¶¶ 59, 60. According to VVL, the contract (whether explicit or implicit) prohibiting all future mining of vermiculite unreasonably burdens trade through its restraint of the "vermiculite mining rights market" in Louisa County and South Carolina and the "vermiculite concentrates market" in the United States. *Id.* ¶¶ 68, 76, 79, 90, 93, 101. VVL complains that the contract between Grace and HGSI, in which they agree (expressly or implicitly) that no vermiculite mining will ever be performed, hinders it (or other potentially interested parties) from acquiring vermiculite mining rights, mining vermiculite, and selling vermiculite. *Id.* ¶ 70. The donation, VVL asserts, was an exclusionary act employed by Grace to achieve (or attempt to achieve) monopoly power in the vermiculite concentrates market in the United States. *Id.* ¶ 76. VVL claims that as a

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[2] The Magistrate requested VVL to amend its complaint to clarify the basis upon which HGSI could be held liable.

consequence its business has depreciated in value and it has suffered increased costs and lost profits. *Id.* at p. 20. As a remedy, VVL seeks damages for past and future harm and equitable relief entailing a rescission of the conveyances and divestiture of the interests from Grace.[3]

Count I alleges a violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (unlawful combination or conspiracy in restraint of trade) by Grace and HGSI; Counts II and III allege a violation of the Sherman Antitrust Act, 15 U.S.C. § 2 (monopolization and attempted monopolization) by Grace only;[4] Count IV alleges a violation of the Sherman Antitrust Act, 15 U.S.C. § 2 (conspiracy to monopolize) by Grace and HGSI; Count V alleges a violation of the Virginia Antitrust Act, § 59.1-9.1 *et seq.* (antitrust violations that mirror federal law) by Grace and HGSI; and Count VI alleges a violation of Va. Code § 18.2-499 (conspiracy to injure another in trade, business, or profession) by Grace and HGSI.

The Magistrate Judge issued a Report and Recommendation on September 19, 1995, recommending dismissal of Counts I, II, and III pursuant to Fed. R. Civ. P. 12(b)(6);[5] the Magistrate declined to exercise jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c) and recommended that they be dismissed without prejudice. Objections followed. On December 28, 1995, upon motion by VVL, proceedings in the case were stayed so that VVL

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[3] Of course, a request for attorneys' fees and costs follows.

[4] In VVL's previous complaints, Counts II and III named HGSI as a defendant.

[5] The Magistrate reasoned that because VVL had no reasonable expectation of acquiring Grace's vermiculite holdings all claims under the Sherman Antitrust Act should be dismissed. Also, the Magistrate found that VVL's complaint failed adequately to plead the necessary elements to support its claims. The separate conspiracy to monopolize count was not contained in VVL's previous complaints.

could determine the status of certain conveyances to HGSI. On motion of both parties, the stay was lifted on November 1, 1996, and VVL filed a motion to amend and supplement the First Amended Complaint with a Second Amended Complaint (which the court herein granted). The objections to the Magistrate's September 19, 1995 Report and Recommendation are now before the court. This, however, does not end the saga of Grace under fire.

On March 12, 1996, two additional, virtually identical, complaints were filed against Grace, one by VVL alone, *Virginia Vermiculite, Ltd., v. W.R Grace & Co.-Conn.*, Civil Action No. 96-0012-C ("Peers I"), and the other by Plaintiffs VVL, M.F. Peers, Jr., and Norma Peers, *M.F. Peers, Jr., Norma Peers, and Virginia Vermiculite, Ltd.*, Civil Action No. 96-0013-C ("Peers II"). Because the two Peers cases involve the same facts, parties, and legal issues, the cases were later consolidated. *See* Order of September 16, 1996, by United States Magistrate Judge B. Waugh Crigler. Accordingly, the court will refer to the cases collectively as the Peers cases, and, unless otherwise indicated, the court's reasoning and holding will have similar application to both cases.

Alfred D. Peers and Elizabeth D. Peers ("Peers I") and M.F. Peers, Jr. and Norma Peers ("Peers II") are, respectively, spouses who reside in Virginia (collectively, "Peers"). Complaint ("Peers I Complaint") ¶ 9, *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, No. 96-0012-C (March 12, 1996); Complaint ("Peers II Complaint") ¶ 7, *M.F. Peers, Jr., Norma Peers, and Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, No. 96-0013-C (March 12, 1996). In the early 1970s, the Peers conveyed land containing vermiculite deposits to Grace. Peers I Complaint ¶¶ 9, 10; Peers II Complaint ¶¶ 10, 11. Part of the consideration for the conveyances was the right to receive royalties for each ton of vermiculite mined from the land, if Grace, solely in its discretion, chose to mine. Peers I Complaint ¶¶ 11, 25; Peers II Complaint ¶¶ 12, 26. In 1992,

Grace donated, the conveyances it received from the Peers to HGSI along with its other vermiculite holdings. Peers I Complaint ¶ 15; Peers II Complaint ¶ 15. Consequently, the Peers lost any possibility of receiving royalties, a loss for which they have received no compensation. Peers I Complaint ¶¶ 18, 19; Peers II Complaint ¶¶ 19, 20. The Peers I assigned 100% of their interest in their claims against Grace to VVL, and the Peers II assigned to VVL a 65% interest in their claims against Grace. Peers I Complaint ¶ 20; Peers II Complaint ¶ 21. Essentially, the Peers claim they have been injured because the conveyances by Grace deprive them of the benefit of the bargain they struck with Grace. The Peers seek damages, attorneys' fees, and costs.

In both complaints, Count I alleges unjust enrichment; Count II alleges breach of contractual duty to exercise discretion in good faith; Count III alleges a breach of contractual duty to pay royalties (on a "constructive mining" theory); Count IV alleges waste; Count V alleges conversion; and Count VI alleges a violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (unlawful combination or conspiracy in restraint of trade).[6]

On September 19, 1996, the Magistrate Judge recommended that Count VI be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) on the same grounds as those stated in his Report and Recommendation issued a year earlier. The Magistrate recommended dismissing without prejudice the remaining counts (claims pursuant to Virginia state law), declining to exercise jurisdiction under 28 U.S.C. § 1367(c). The parties filed objections, currently before the court.

III. DISPOSITION OF CASES

For reasons different from those relied upon by the Magistrate, the court holds that all of the Peers' claims against

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[6] HGSI is not a defendant in the Peers cases.

Grace must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), including the state law claims, which the court will address pursuant to 28 U.S.C. § 1367(a). Again, for different reasons than those of the Magistrate, the court holds that Count I of VVL's complaint must be dismissed; pursuant to § 1367(a), the court will exercise jurisdiction over VVL's state law claims and dismiss Count V, except insofar as Count V alleges unlawful monopolization, an unlawful attempt to monopolize, or conspiracy to monopolize against Grace (but not HGSI). The court will dismiss Count VI insofar as it applies to HGSI, but not insofar as it applies to Grace. Hence, HGSI must be dismissed as a defendant in this case; Grace remains in the case brought by VVL under Count II (monopolization), Count III (attempted monopolization), Count IV (conspiracy to monopolize), Count V (state law antitrust claims alleging monopolization, attempted monopolization, and conspiracy to monopolize), and Count VI (state law civil conspiracy claim). Because, with respect to the Section 1 claims, the Peers advance arguments and allegations largely identical in pertinent part to those of VVL, the court's disposition of VVL's Section 1 claim will apply equally to the Peers' Section 1 claims.

IV. STANDARD UNDER FED. R. CIV. P. 12(b)(6)

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure "failure to state a claim upon which relief can be granted" provides grounds for dismissal. For purposes of a Rule 12(b)(6) motion, all factual allegations in the plaintiff's complaint must be accepted as true. *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 217-18 (4th Cir. 1994). The plaintiff's complaint ought not be dismissed unless it is apparent that the plaintiff "would not be entitled to relief under any facts which could be proved in support of [his] claim[s]." *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In determining whether to dismiss a claim under the Sherman Antitrust Act under Rule 12(b)(6), "allegations covering all

the elements that comprise the theory for relief" must be stated. *United States v. Employing Platerers Ass'n*, 347 U.S. 186, 189 (1954); *Miller & Smith*, 943 F.2d at 220 (quoting *Municipal Utilities Bd. of Alberville v. Alabama Power Co.*, 934 F.2d 1493, 1501 (11th Cir. 1991) ("A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified.")). If the plaintiff has not alleged the facts necessary to support his claim, such facts will not be assumed by the court to exist. *Miller & Smith*, 943 F.2d at 221.

V. SECTION 1 CLAIMS

A. APPLICABILITY OF SECTION 1 TO HGSI

The threshold question in this case is whether Section 1 of the Sherman Antitrust Act can be used as a tool against HGSI, or whether these "facts have been forced into an antitrust mold to achieve federal jurisdiction." *Havoco of America, LTD. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980).

1. LEGAL STANDARD UNDER SECTION 1 AS IT APPLIES TO NONPROFIT ORGANIZATIONS

Section I of the Sherman Antitrust Act provides, in pertinent part, as follows:

> Every contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

15 U.S.C. § 1.

Section 1 of the Sherman Antitrust Act carries a smaller stick than this expansive language would suggest. Contrary to its simplistically all-encompassing directive, not every contract, combination, or conspiracy that restrains trade violates the Act. *See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 98

(1984). Since most business contracts can be said to restrain trade, few would be safe were the plain language of the Act to be taken at its word.[7] *See Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (stating that the language is "broad enough to embrace every conceivable contract . . . in the whole field of human activity"). Therefore, even if one believes, with Justice Scalia, that legislative history should not aid, let alone displace, interpretation of clear statutory language,[8] the Sherman Antitrust Act forces its students to glean meaning from congressional debates. *See National Organization for Women* ["NOW"] *v. Scheidler*, 968 F.2d 612, 617 (7th Cir. 1992) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1976); *Apex Hosiery Co. v. Leader*, 3 10 U.S. 469, 489 (1939)), *rev'd on other grounds*, 510 U.S. 249 (1994).

Although there has been substantial dispute among commentators as to the appropriate meaning to be derived

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[7] The Supreme Court has carved out various exceptions. *See, e.g., United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) (holding that the Act does not cover attempts to influence executive to adopt labor standards); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) (holding that using false information to persuade state governmental actors to enact legislation that injures competitors is not actionable under the Act); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) (holding that unless objectively baseless, litigation is protected under the Noerr-Pennington Doctrine, which protects right to petition government); *Parker v. Brown*, 317 U.S. 341 (1943) (holding state action exempt from purview of the Act); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981) (holding that consumer boycott of businesses organized by blacks to achieve racial equality could not be reached by state antitrust laws); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 484 (1940) (holding that violent union take over of factory did not implicate antitrust laws).

[8] See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990) (outlining Justice Scalia's theory of statutory interpretation).

from the legislative history of the Act, few would disagree about the Act's core purpose. *See* Einer Richard Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 697-98 (1991) (citing different theories of scholars);[9] Herbert Hovenkamp, Antitrust's Protected Classes, 88 Mich. L. Rev. 1, 21-24 (1989) (same); *Scheidler*, 968 F.2d at 621. The central evil that the Act sought to conquer was the combination of corporate giants or trusts, conspiring to hinder competition in order to raise prices and reap supracompetitive profits to the detriment of consumers (and competition).[10] *See* 1 Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes (1978) (quoting legislative debates); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) ("The [Supreme Court has] . . . recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which have other objectives."); *Apex Hosiery*, 310 U.S. at 493 (same). Despite their apparent distance from "Big Business," nonprofit organizations have been brought within the scope of the Act.[11] *See Goldfarb v. Virginia State Bar*, 421 U.S. 773

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[9] Professor Elhauge, of counsel to VVL in this case, argues that the Sherman Antitrust Act was not intended to govern financially disinterested restraints that are not commercial in nature. *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 738-46 (1991).

[10] Included among the practices viewed by the Supreme Court as most dangerous are the following: horizontal and vertical price-fixing, certain tying arrangements, group boycotts or concerted refusals to deal, and horizontal market divisions. *See* 2 Julian Von Kalinowski, *Antitrust Laws & Trade Regulation* § 6.02[1] (1984); see also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) (citing practices).

[11] Although it is beyond cavil that nonprofit organizations are subject to federal antitrust laws, *see American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982), the Supreme Court has flinched, if only in dictum, at the prospect of exposing nonprofit organizations to the same liability faced by for-profit businesses. *See*

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(1975) (invalidating minimum fee schedule for legal services published by nonprofit professional organization). Nonprofit organizations, however, have been awarded a limited immunity from antitrust liability: if their activities are "noncommercial," nonprofit organizations can escape the reach of the Act. *Compare United States v. Brown University*, 5 F.3d 658, 665-66 (3d Cir. 1993) (holding that Section 1 of the Act applies to a group of universities that agree to abide by common rules governing disbursement of financial aid with departure from rules punishable by sanctions) (citing *Goldfarb*, 421 U.S. at 787-88), *with Scheidler*, 968 F.2d at 617-23 (holding that "organizations espousing social causes," such as violent anti-abortion protestors, fell beyond the scope of the Act), and *Missouri v. National Organization for Women* ["NOW"], 620 F.2d 1301, 1304-05 (8th Cir. 1980) (holding that NOW's boycott against all states that had failed to ratify the Equal Rights Amendment could not be redressed by the Sherman Antitrust Act, despite the boycott's economic impact). "Benign" intent (e.g., concern for public welfare) alone will not excuse a nonprofit organization engaged in commercial activity from entering into an otherwise illicit agreement. *See, e.g., FTC v. Superior Court Trial Lawyers*, 493 U.S. 411 (1990) (rejecting claim that challenged agreement was necessary to induce better lawyers to represent indigents); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 463 (1986) (rejecting claim that challenged agreement was necessary for quality dental care); *National Society of Professional Engineers v. United States*, 43 5 U.S. 679, 695 (1978) (rejecting claim that challenged agreement was necessary to insure public safety). But the Act does not control the conduct of an eleemosynary organization pursuing primarily political or social objectives,

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Goldfarb v. Virginia State Bar, 421 U.S. 773, 778-89 n.17 (1975); *but see National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978) (flinching from the flinch).

from which it does not receive pecuniary gain. *See* Herbert Hovenkamp, Federal Antitrust Policy § 5.4e (1994) [hereinafter Hovenkamp, Antitrust Policy]; Herbert Hovenkamp, Economics and Federal Antitrust Law § 10.2 (1985) [hereinafter Hovenkamp, Antitrust Law].

Aside from sound policy considerations suggesting the wisdom of carving out a special exception for nonprofit organizations engaged in noncommercial transactions, the exemption finds support in the legislative history of the Act and subsequent case law. As the courts in *Missouri v. NOW* and *Scheidler* have detailed, the only congressional debates addressing the issue indicate that the Act was not intended to govern activities by noncommercial entities with noncommercial objectives. In the late 1800s, liquor saloons were the focus of the same type of vitriolic attack to which abortion clinics have fallen prey today. *See Scheidler*, 968 F.2d at 618-620 (citing legislative history and historical sources and describing the remarkable similarities between the invasions suffered by abortion clinics and liquor saloons). Participants in the temperance movement often employed violent tactics to drive establishments legally serving alcohol out of business. *Id.* Reduction (by destruction) of liquor supply was one method used to achieve their goal. *Id.* An important opponent of the Act, Senator George, worried that the antitrust laws would be brought to bear against "purely moral and defensive" agreements; he criticized the Act for potentially bringing "within [its] terms . . . any number of persons belonging to or joining a temperance society whose object [was] to compel retailers of intoxicating liquors to give up their business." 1 Kintner, *supra*, at 77-79 (quoting 20 Cong. Rec. 1458-59 (1889)). Responding to speculation that concerted agreement to destroy the liquor business could possibly fall within the Act, Senator Sherman (the Act's sponsor), stated as follows:

. . . I do not see any reason for [including within the Act's reach] temperance societies any more than churches or

school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce. . . . You might as well include churches and Sunday schools.

Id. at 250-52 (quoting 21 Cong. Rec. 2658-59 (1890)).

Relying upon this legislative history, the court in *Scheidler* concluded that the Act "was intended to prevent business competitors from making restraining arrangements for their own economic advantage." 968 F.2d at 621. But "an industry faced with violent opposition from some segment of the public" could not seek refuge in the antitrust laws. *Id.* at 622. For instance, the Seventh Circuit rejected the possibility that Earth First!, an environmental group that vandalizes equipment belonging to nuclear power and logging companies, could be sued by its victims for antitrust violations. *Id.* Thus, the court in *Scheidler* held that the furious, concerted attacks staged by anti-abortion groups against abortion clinics were not governed by Section 1 even if these groups "rais[ed] prices [of abortions] by increasing costs [to abortion clinics]." *Id.* at 623. In a footnote, the court indicated that competitors would be subject to the antitrust laws for like conduct. *Id.* at 623 n.13.

Turning to more halcyon times, the court in *Marjorie Webster Jr. College v. Middle States Association of Colleges and Secondary Schools*, 432 F.2d 650 (D.C. Cir. 1970), dispensed quickly with arguments that federal antitrust laws barred the decision of a nonprofit educational association to deny accreditation to a proprietary junior college because, pursuant to its policy, accreditation was extended only to nonprofit institutions. The Sherman Antitrust Act, the court explained, was not "tailored . . . for the non-commercial aspects of the liberal arts and the learned professions." 432 F.2d at 654 (internal quotations, citations, and footnotes omitted). In contrast to a situation where "accreditation [was] denied any institution purchasing textbooks from a supplier

who did not provide special discounts for association members," *id.* at 655 n.21, the defendant was not compensated (monetarily) for its accreditation services; the defendant's objectives were thus noncommercial and not actionable under the Sherman Antitrust Act despite "an incidental restraint on trade," *id.* at 654, i.e., a setback to proprietary colleges in their efforts to recruit students.

The Ninth Circuit appeared rather insulted at the suggestion by one nonprofit animal shelter society, Dedication and Everlasting Love to Animals ("DELTA"), that another similar organization, Humane Society of the United States ("Humane Society"), was guilty of violating the antitrust laws through its solicitation of donations. *DELTA v. Humane Society of the United States, Inc.*, 50 F.3d 710 (9th Cir. 1995) (alleging violations of Sections 1 and 2 of the Sherman Antitrust Act). Comparing the case to a hypothetical where "'two philanthropists . . . 'divide the market' by agreeing that one would care for the homeless on the east side of town while the other did so on the west side,'" the Ninth Circuit rejected the notion that a charitable organization "competing" with another in the "market" for public contributions could be brought within the scope of the antitrust laws. *Id.* at 714 (quoting Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 232.2 (1989 & Supp. 1993)). This was simply not "commerce" within the meaning of the Sherman Antitrust Act, the Ninth Circuit concluded, and the gain derived by the Humane Society "[f]rom its donations, . . . [in the form of] reputation, prestige, [and] money for its officers" did not transform its fundraising, even if "self-serving," into a commercial transaction. 50 F.3d at 714.

These cases and the Act's legislative history suggest that to the extent the Act "sets up a code of ethics," *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 140 (1961), the code does not govern the country; it governs commerce. The purpose of the Act is to ensure that competition reigns supreme in the business world. But the

Sherman Antitrust Act makes no value judgment that competition in the business world should be elevated over pursuit of noncommercial social or political objectives by noncommercial social or political organizations.

2. LEGAL STANDARD GOVERNING NONPROFITS AS IT APPLIES TO HGSI

Having laid out what the court believes to be controlling law, it will now consider whether VVL can sue HGSI under Section 1.

The following facts are drawn from VVL's complaint. Although VVL has alleged that HGSI is motivated by the desire to protect its land values from plummeting, the complaint makes clear that concern with property values is tangential to HGSI's primary objective. HGSI, first and foremost, concerns itself with preserving national landmarks, mainly for (nonpecuniary) aesthetic, historic, and environmental reasons. HGSI has never been interested in mining or selling vermiculite for profit; it is uninterested in profiting from the purchase or sale of vermiculite mining rights. To be sure, HGSI has a stake in the market for vermiculite and vermiculite mining rights. HGSI wishes to restrict the production of vermiculite and it hopes to acquire vermiculite mining rights. But HGSI does not desire to suppress supply and dominate the vermiculite mining rights market in the same way that a for-profit corporation competing for vermiculite or vermiculite mining rights would. The goal of HGSI and a hypothetical competitor are alike only in the most superficial way. Whereas the latter strives to achieve the goal for business purposes--to raise price and to increase its profits--HGSI makes no profit from its acquisition of vermiculite mining rights and is indifferent to the going price of vermiculite concentrates. This is not to say that HGSI's efforts to suppress the supply of vermiculite (or vermiculite mining rights) cannot detrimentally affect competition. Ignoring for the moment potential substitutes

for vermiculite (as well as other relevant characteristics of the market), it can be readily assumed, at this stage of the analysis, that a constriction of a finite supply of vermiculite may drive up the price of that resource. The same can be said for vermiculite mining rights. But the Sherman Antitrust Act does not redress all anticompetitive effects; little doubt exists that attacks perpetrated upon liquor saloons and abortion clinics had an unhealthy impact on competition as well, but neither Congress nor the Seventh Circuit believed that this anticompetitive effect should lead to antitrust liability.

If one overlooks the surface differences, HGSI fits comfortably into the mold of the anti-abortion agitators and the temperance activists.[12] All wish to extinguish a class of producers: those dealing in abortions, liquor, and vermiculite. *See Scheidler*, 968 F.2d at 622 (emphasizing that the anti-abortion protestors targeted *all* abortion clinics). None profit financially from reducing the supply and increasing the price of their targets--their goal--achieved by a sustained campaign against, as the case may be, abortionists, saloonists, or vermiculite producers. None is alleged to have market power (i.e., "the ability to . . . increase . . . profits by reducing output and charging more than a competitive price," Hovenkamp, *supra*, Antitrust Law § 3.1).[13] The objective of each is properly classified as political or social. Accordingly, the court finds that, like the participants in the temperance movement and anti-abortion movement, HGSI is not engaged in commercial activities and should not be exposed to antitrust liability.

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[12] By no means should this statement be taken to suggest that HGSI's conduct is morally comparable to the vicious acts of these groups.

[13] VVL abandoned, in its Second Amended Complaint, the claim that HGSI has market power in the vermiculite mining rights market.

3. VVL'S OPPOSING ARGUMENTS

VVL makes sundry arguments, many of which are certainly accurate, but nonetheless do not help its cause. Initially, VVL emphasizes that nonprofit organizations are entitled to no blanket exemption from the Sherman Antitrust Act. The court readily agrees. Next, VVL contends that HGSI's "good" intentions will not shield it from liability under Section 1. This too is true, but incomplete. Although "malign," anticompetitive intent is not a prerequisite to a Section 1 claim, intent or objective is relevant in determining whether a nonprofit organization's activities are commercial in nature. *Marjorie Webster*, 432 F.2d at 654 (emphasizing the noncommercial objectives of the nonprofit educational association accused of violating antitrust laws, but noting that lack of predatory intent will not save an activity that otherwise falls within the scope of the Act); *Association for Intercollegiate Athletics for Women v. N.C.A.A.*, 735 F.2d 577, 584 n.8 (D.C. Cir. 1984) (*per curium*) (We acknowledge that some practices by nonprofit organizations may produce anticompetitive effects but still be essential to the organization's achieving its legitimate noncommercial objectives. In such case, we do not foreclose the possibility that achieving the essential noncommercial objective may justify some anticompetitive impact.") (citations omitted). As discussed above, the facts alleged in VVL's complaint do not permit the court to arrive at any conclusion but that HGSI's objectives are noncommercial.

Citing *Brown*, 5 F.3d at 668, VVL urges that nonprofit organizations, regardless of the aspirations expressed in their charters, are capable of trafficking in commerce. Nothing in Brown is inconsistent with the court's discussion here. Contrasting its case from *Marjorie Webster*, where accreditation brought the defendant no monetary gain, the court in *Brown* held that a university does not merely engage in charity when it "discount[s] the price of educational services for needy students . . . [in exchange for] tangible

benefits." *Id.* at 666. After it determined that financial aid constituted a part of the tuition price, the court found that the defendant university "immuniz[ed] itself . . . from competition" in abiding by an agreement with other universities to disburse financial aid only on the basis of need. *Id.* Such circumstances are missing from this case. Like the defendant in *Marjorie Webster*, HGSI does not derive pecuniary gain from suppressing vermiculite mining; to the extent that its land values are enhanced by a cessation of mining, this benefit is merely incidental to its overriding goal of preserving land for nonpecuniary reasons. Secondary benefits such as this redound to most, if not all, charitable organizations and quintessentially noncommercial institutions. Marriage entered into for love may yield far more concrete treasures.[14] Accepting the presence of such benefits as evidence of commercial activity would easily bring virtually any transaction within the scope of the Sherman Antitrust Act. *See DELTA*, 50 F.3d at 714 (noting that self-serving efforts to enhance reputation, prestige, and remuneration to officers do not necessarily qualify an activity as commercial in nature). This is exactly the result the court wishes to avoid.

The only argument left to VVL boils down to the truism that this case is of first impression. VVL remarks that none of the cases upon which HGSI relies involve an allegation that a nonprofit organization conspired with a business competitor. VVL is correct; the unique circumstances in this case, to this court's knowledge never encountered by any other court, force one to reason by analogy.[15]

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[14] *See* infra note 17.

[15] VVL cites *Allen v. Bradley Co. v. Union*, 325 U.S. 797, 810 (1945), and *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939), for the proposition that even if HGSI were entitled to an exemption from antitrust liability, its exemption would be forfeited because of its alleged conspiracy with Grace, its competitor. In *Borden* and in *Allen*, however,

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At first blush VVL's insistence that the presence of a business competitor, Grace, allegedly acting in concert with HGSI, distinguishes this case from *Scheidler* (and, by implication, the temperance movement) seems persuasive. A second glance, however, casts doubt on the importance of Grace's involvement. VVL's argument leads the court to the following hypotheticals. If the participants in the temperance movement, instead of hammering away at liquor saloons, accepted donated saloons on the condition that liquor would never again be served on their premises, would this violate Section 1? Alternatively, if the anti-abortion protestors renounced assaults upon abortion clinics, and instead accepted donated clinics with the agreement that abortions would never be performed on their premises, would this violate the antitrust laws? If the answer to these questions were yes, the message to HGSI would surely be that it transform itself into a version of Earth First! and strive toward its preservation goals with more (physical) vigor. Competition would not be advanced by such a perverse incentive.[16]

On the other hand, if HGSI did not succumb to violence to avoid an antitrust lawsuit, it would have few options available to it in furthering its goal of halting vermiculite

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there was no question that the defendants were engaging in commercial transactions. The agricultural producers in *Borden* received pecuniary benefit by entering into an agreement to extract supracompetitive prices for milk, and the labor unions in *Allen* conspired with other groups in order to win higher wages. In contrast, HGSI's primary objective is not to achieve pecuniary gain, and, consistent with its objective, HGSI's gain from its agreement is largely nonpecuniary.

[16] Of course, what one can legally achieve unilaterally, one cannot necessarily achieve in concert with another under Section 1. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). This principle, however, is not at issue here; rather, the issue is whether the identity of the alleged conspirator (in *Scheidler*, other anti-abortionists; in this case, Grace) is dispositive.

mining. Politely badgering the producers of vermiculite, if effective, would be dangerous--a disgruntled competitor could petition a court of law for relief. And yet, as VVL concedes, HGSI's desire to preserve land (for the sake of beauty, history, and environment) is a legitimate social objective. As has been emphasized by two somewhat different commentators, the Ninth Circuit and author David Foster Wallace, "[n]ot every aspect of life in the United States is to be reduced to . . . a single-minded vision of the ubiquity of commerce." *DELTA*, 50 F.3d at 714 (expressing disturbance at the prospect of federal antitrust laws that impinge upon "everything from . . . church fair[s] to . . . solicitation of voluntary blood donors . . . [to] engagement[s] or marriage[s]").[17] On a more entertaining note, David Foster Wallace, in his novel *Infinite Jest*, envisions a mad

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[17] Although the Ninth Circuit's invocation of engagement and marriage seems far-fetched, some do not view romance as something far-removed from the business world. See Saul Levmore, *Love it or Leave it: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 Law & Contemp. Probs. 221, 228 (1995) (comparing "the traditional [business] partnership rule" to "the law governing marriages," both of which "promise[] liquidity by offering every participant the right to exit with the net value of that participant's share in the enterprise, but . . . [with] no other [available] remedy"); Saul Levmore, *Irreversibility and the Law: The Size of Firms and Other Organizations*, 18 J. Corp. Law 333, 356 (1993) (describing the problem of irreversibility--undesirable expansion that may be difficult to undo--in the corporate context and analogizing to the familial sphere, where the problem is the flip side of irreversibility, because "[i]n the family setting, 'agents' may have a propensity to quit, or contract selfishly, when things are difficult").

Perhaps the laws against polygamy should be characterized as government imposed rationing; whereas in the business world, the individual with the most money can purchase an amount of goods limited only by his preferences and his purchasing power, in the market for marriages, the individual with the most "purchasing power," in terms of attractiveness and charisma, cannot "buy" all that she is willing and able without running up against the law.

commercialization of America, leading to "ecological gerrymandering" and an unwelcome donation of our fatally polluted Northeastern states (the "toxically convex addition") to Canada.[18] The court is convinced that the Sherman Antitrust Act neither intended to invade the sphere of courtships and picnics nor to prevent organizations such as HGSI from battling against a perceived dysutopia where America is ecologically gerrymandered and Canada is compelled to receive America's unwanted toxically convex addition. Again, the core purpose of the Act is "to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade." *Allen v. Bradley Co. v. Union*, 325 U.S. 797, 806 (1945). Consequently, the court holds that, on the facts of this case, the Sherman Antitrust Act does not apply to HGSI.

4. EXISTENCE OF AGREEMENT BETWEEN HGSI AND GRACE

VVL urges that even if "HGSI's motives . . . excuse it from liability, they would not excuse Grace." VVL's Objections of October 2, 1995 (citing *Perma Life Muffers, Inc. v. International Parts Corp.*, 3 92 U.S. 134 (1968)). VVL's premise is mistaken: HGSI's *motives* do not excuse HGSI from liability; the nature of the transaction, elucidated by an examination of motives, removes HGSI from the reach of the Sherman Antitrust Act. Nonetheless, the court agrees that simply because HGSI cannot be held liable under Section 1 does not mean that Grace too escapes liability. Section 1 liability only attaches to concerted action, which requires "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

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[18] For a brilliant commentary, see David Foster Wallace, *Infinite Jest* 398-407 (1996).

Grace takes the position that this definition requires anticompetitive intent or an overlap in motives between the conspiring parties.

Given the present state of the law, the court cannot accept Grace's argument that anticompetitive intent or similar objectives on the part of both parties must exist before a conspiracy can be formed under Section 1. To demonstrate the point with a dramatic case, the Supreme Court has speculated in heretofore dormant dictum that a carrier who lost customers to a lower-priced competing carrier could allege that a conspiracy within the meaning of Section 1 existed between the newspaper which hired the competing carrier and the lost customers. *See Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968). One need not go this far; indeed, one ought not, for neither lower courts nor the Supreme Court have been faithful to *Albrecht*'s extreme. Other case law, relying upon more commonly invoked principles than potential consumer liability, makes plain, albeit with less pungency than *Albrecht*'s infamous dictum, that no overlap in motive is required. For instance, in *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987) (Posner, J.), the plaintiff, a dealer, claimed that the defendant, a supplier, had forced him, with threats and harassment, to raise retail prices on the stoves he sold. Judge Posner, speaking for the Seventh Circuit, observed that "[t]he fact that [an antitrust plaintiff] may have been coerced into agreeing is of no moment; an agreement procured by threats is still an agreement for purposes of [S]ection 1." *Id.* at 1163 (citing *Albrecht* and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960)). Of course, in yielding to the supplier, the dealer's motive was neither anticompetitive nor the same as that of the supplier; rather, he wished only to avoid the harassment and threats to which he had been subject.

Grace is led astray by the language in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), emphasizing the need for "'a conscious commitment to a common scheme

designed to achieve an unlawful objective.'" *Id.* at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)). *Monsanto* dealt only with the question of how much proof must be adduced to show concerted (as opposed to unilateral) action; the Supreme Court held that "an antitrust plaintiff . . . [must do more than] show[] that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors [to establish agreement within the meaning of Section 1]." 465 U.S. at 759. The language upon which Grace relies focuses on commonality and conscious agreement mainly to ensure that two independent actors--the manufacturer and the distributor--do not get ensnared in Section 1 liability simply because there is some slight evidence that their acts are connected or because a manufacturer announces a policy and the distributor complies (*see United States v. Colgate & Co.*, 250 U.S. 300 (1919)). *Monsanto* does not purport to adjudicate the issues of the parties' intent, other than to assure that they have agreed to a certain course of conduct.

In this case, there is no issue of proof, this is a Rule 12(b)(6) motion and VVL has adequately alleged an agreement within the meaning of Section 1 between HGSI and Grace. This agreement is embodied in the restrictive covenants or the alleged implied agreement entered into by HGSI and Grace, in which they decide that there will be no mining on the conveyed properties. That HGSI had no anticompetitive intent or commercial objective does not factor into the analysis. Therefore, Grace cannot "free ride" on HGSI's defense to avoid Section 1 liability. Even so, Grace has another defense available to it, by which it can escape Section 1.

B. ANTITRUST INJURY AND THE REQUIREMENT OF PROXIMATE CAUSE

1. LEGAL STANDARD UNDER SECTION 1

To establish a violation under Section 1 of the Sherman Antitrust Act, an antitrust plaintiff must demonstrate that (1) at least two persons entered into an agreement, and (2) the agreement unreasonably restrains trade. *Miller & Smith*, 14 F.3d at 220 (citing *Oksanon v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991)). Ultimately, the plaintiff must show "'that the conspiracy produced adverse, anticompetitive effects within the relevant product and geographic market.'" *Advance Health-Care Serv. v. Radford Community Hospital*, 910 F.2d 139, 144 (4th Cir. 1990) (quoting *Terry's Floor Fashions v. Burlington Indus.*, 763 F.2d 604, 610 n.10 (4th Cir. 1986)). Sections 4[19] and 16[20] of the Clayton Act, 15 U.S.C. § 15 (providing for treble damages), § 26 (providing for injunctive relief) confer standing upon a private party to enforce the antitrust laws. As a prerequisite to suit, a private party, such as VVL, must establish actual or threatened "antitrust injury," the former under Section 4, and the latter under Section 16. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111, 113 (1986) (holding that the "antitrust injury" requirement applies to Section 16 as well as Section 4 claims). An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows

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[19] [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor, . . . and shall recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15(a).

[20] Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ." 15 U.S.C. § 26.

from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. "To establish an antitrust injury, a plaintiff must show not only that the injury is of the type intended to be protected by the antitrust laws, but that the violation was [or will be] 'the cause-in-fact of the injury: that 'but for' the violation, the injury would not [or will not] have occurred.'" *O.K. Sand & Gravel, Inc. v. Martin Marietta Technologies, Inc.*, 36 F.3d 565, 573 (7th Cir. 1994) (quoting *Greater Rockford Energy & Technology v. Shell Oil*, 998 F.2d 391, 394-96 (7th Cir. 1993)), *see Advance Health-Care*, 910 F.2d at 149 ("[A] plaintiff must show a reasonably probable causal link between the antitrust violation and a business loss of the sort the antitrust laws were designed to prevent.") (citing, *inter alia*, Cargill).

In *Martin Marietta*, the plaintiff and the defendant, competing sand and gravel companies, entered into an agreement establishing the defendant as the exclusive sand sales agent for the plaintiff. Suspecting that the defendant was selling its sand at unauthorized discounts, the plaintiff terminated the agreement with the defendant and, some months later, contracted with another company to sell its sand. Subsequently, the plaintiff brought suit, and the defendant counterclaimed, alleging that the plaintiff's agreement with the other company violated antitrust laws. The Seventh Circuit held that the defendant had failed to satisfy the causation requirement, because there had been no showing that any injury to the defendant (termination of the agreement between itself and the plaintiff) had been caused by the plaintiff's new agreement. 36 F.3d at 573-74 (stating that there must be showing that "'violation was a material element of, and substantial factor in, producing the injury'") (quoting *Greater Rockford Energy*, 998 F.2d at 401). Without showing proximate cause, the defendant could not proceed on its claims, even if the challenged agreement was violative of the Sherman Antitrust Act. 36 F.3d at 572-74.

2. REQUIREMENT OF PROXIMATE CAUSE APPLIED TO VVL'S ALLEGED INJURY

The court is mindful that, unlike in *Martin Marietta*, the force of Rule 12(b)(6) tips the balance strongly in favor of VVL. Nevertheless, the court believes that even under the lenient standard dictated by Rule 12(b)(6), VVL cannot proceed on its Section 1 claim against Grace and HGSI because its complaint contains no allegation that without the allegedly illegal restraint, injury to VVL would have been avoided. Worse yet (for VVL), everything in its complaint points to the opposite conclusion: that the alleged restraint was entirely superfluous. It must not be forgotten that the alleged restraint under attack is not the mere donation from Grace to HGSI;[21] rather, the restraint that VVL claims violates Section 1 is the agreement that the conveyances comprising the donation never be mined for vermiculite. The restrictive covenants most baldly illustrate the alleged restraint, but the alleged implicit agreement never to permit vermiculite mining also qualifies.

The incurable defect in VVL's complaint comes from a glaring omission: nowhere does VVL allege, nor could it, that "but for" the express or implied agreement between Grace and HGSI, HGSI or its successor would otherwise allow vermiculite mining. As Grace succinctly stated during oral argument, VVL does not even allege such a probability or a slim possibility. Transcript of January 31, 1997 Hearing at 41-43. Perhaps the absence of this allegation could be forgiven in a different complaint; but certain allegations in VVL's complaint so sharply contradict any scenario in which

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[21] The donation itself, stripped of any explicit or implicit understanding against mining, could not violate Section 1, because, absent the understanding between Grace and HGSI there would be no concerted action alleged to have unreasonably restrained trade.

HGSI--if only freed of the agreement with Grace--would permit vermiculite mining that there can be no colorable claim that the agreement with Grace has any effect on HGSI's position against vermiculite mining. As counsel for VVL lamented during oral argument, "[VVL] can't contradict [its] own allegations [in its complaint]." *Id.* at 17. The court can understand counsel's chagrin, for to state a claim under Section 1, VVL would have to abandon the facts pled in the complaint. VVL explains that "[s]ince the early 1970's, one of HGSI's avowed goals has been and continues to be to eliminate all vermiculite mining throughout Louisa County. . . . For over 20 years, HGSI conducted a campaign to obtain from Grace all of its mining rights and other property interests in Louisa County." Second Amended Complaint ¶¶ 36, 37. This set of facts cannot be squared with the contention (not made in VVL's complaint) that without an implicit or explicit agreement burdening HGSI, it would entertain suggestions that vermiculite mining be commenced on the donated conveyances. HGSI, according to the complaint, has held an unwavering commitment to halt all vermiculite mining for over two decades; VVL's complaint leaves no room for an inference that this commitment is brought about by, or even affected by, an agreement with Grace, for the agreement did nothing more than secure a promise from HGSI to keep doing what it intended all along to do. One does not extract a concession from a caged bird, freed only on the condition that it will fly away when the door swings open.

VVL's counsel weakly argues that "if HGSI were to believe that mining could be conducted in a way . . . that would be consistent with historic preservation . . . [because of reclamation, it is] not going to be able to allow that [because of the agreement with Grace]." Transcript of January 31, 1997 Hearing at 17-18. Counsel forgets that he has already conceded that this "is not HGSI's position today. . . . [and that he] understand[s] it hasn't been [HGSI's] position for the last 20 years." *Id.* at 17. Nor does anything in VVL's complaint

foreshadow a change. The case law instructs that "a complaint should not be dismissed 'merely because the court doubts that the plaintiff will ultimately prevail; so long as a plaintiff colorably states facts which, if proven, would entitle him to relief, the motion to dismiss should not be granted.'" *Advance Health-Care*, 910 F.2d at 145 n.8 (quoting *Adams v. Bain*, 697 F.2d 1213, 1216 (4th Cir. 1982)). If VVL proves the facts stated in its complaint, it could not prevail, because the court concludes that, as a matter of law, the facts demonstrate that the allegedly unreasonable restraint on trade is not the proximate cause of any threatened or actual injury to VVL. Consequently, all Section 1 claims against Grace (and HGSI) must be dismissed on this ground alone.[22]

VI. SECTION 2 CLAIMS

Though this is bound to be of little consolation to Grace, the court is persuaded that economic reality probably supports its position with respect to the Section 2 claims against it. Nonetheless, the posture of this case prevents the court from taking up Grace's invitation to look past the allegations in VVL's complaint. With the arguments Grace offers the court, it essentially hopes to make the court forget that this is a Rule 12(b)(6) motion (time is surely on Grace's side); Grace's arguments are of the sort that can only succeed forty-four rules down the line (on a motion for summary judgment pursuant to Fed. R. Civ. P. 56). The court repeats the admonition from the Fourth Circuit: conviction by the court that the plaintiff will not succeed on his claim does not justify dismissal under Rule 12(b)(6) when the plaintiff has colorably stated the allegations necessary to his cause of action. *Advance Health-Care*, 910 F.2d at 145 n.8 (quoting *Bain*, 697 F.2d at 1216). Further, the court notes that it is not

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[22] Because of this conclusion, the court need not reach the question whether the Peers (neither competitors nor consumers) have standing to pursue Section 1 claims against Grace.

at liberty at this stage of the analysis quietly to overlook certain Supreme Court precedent of arguably dubious economic validity (as various appellate courts have done at subsequent stages of litigation). *See Advance Health-Care*, 910 F.2d at 148 n.16; *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.).

A. LEGAL STANDARD UNDER SECTION 2

Section 2 of the Sherman Antitrust Act prohibits any "person . . . from monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . ." 15 U.S.C. § 2. Under Section 2, unlike Section 1, unilateral conduct is actionable. VVL charges Grace with monopolization, attempted monopolization, and conspiring to monopolize; HGSI stands accused only of conspiring to monopolize.

To state a claim of monopolization, a private antitrust plaintiff must allege "possession of monopoly power in the relevant market," "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident," *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.19 (1985) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)), and causal antitrust injury. *Advanced Health-Care*, 910 F.2d at 147.

To state a claim of attempted monopolization, the plaintiff must allege "a specific intent to monopolize a relevant market, predatory or anticompetitive acts, and a dangerous probability of successful monopolization." *Id.*

To state a claim of conspiracy to monopolize, the plaintiff must allege a conspiracy, an overt act committed in furtherance of the conspiracy, a substantial effect on

commerce, and specific intent to monopolize. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

B. ARGUMENTS OF GRACE AND HGSI

With respect to the monopolization claim, Grace makes the following arguments in support of its motion to dismiss. First, Grace maintains that its market share cannot support a finding of market power because its share is too small and, at that, declining. Second, Grace insists that it had no duty to sell its holdings to VVL and therefore cannot be guilty of a Section 2 violation for failing to do so. Third, Grace offers that its legitimate business reason--a considerable tax deduction--relieves it from any supposed duty it had to deal with VVL. Fourth, Grace disputes the presence of causal antitrust injury. In opposing the attempted monopolization claim, Grace adds the argument that its offer to sell the donated properties to VVL negates anticompetitive intent. Addressing the conspiracy to monopolize claim, Grace repeats the argument it made on the Section 1 claim against it: HGSI and Grace did not share a common intent and consequently did not agree within the meaning of Section 2. Finally, Grace contends that laches bars VVL from requesting divestiture of the transferred properties. HGSI continues to rely on its previous argument: that, as a nonprofit organization whose activities are noncommercial, it is not subject to the antitrust laws.

Although it challenges all other elements, Grace appears to concede, and the court finds, that VVL has sufficiently alleged an overt act (for the conspiracy to monopolize claim) and a substantial effect on commerce (for the conspiracy to monopolize claim).

C. ECONOMIC BACKGROUND

To address defendants' arguments, a brief overview of economics is in order. For a Section 2 claim, two concepts must be understood: market or monopoly power and relevant market. As discussed above, market power is "the ability to .

. . increase . . . profits by reducing output and charging more than a competitive price." Hovenkamp, *supra*, Antitrust Law § 3.1. Monopoly power is a high dosage of market power. *Id.* § 5.2. Although various factors are important in determining whether a firm has monopoly power (such as entry barriers, economies of scale, concentration), often the analysis turns on market share--generally, the higher the market share the easier is the plaintiff's case. *Id.* Usually, courts require a threshold showing of 60-70% before they will infer monopoly power from market share. *See* William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 951 (1981) (discussing the role of elasticity of demand--responsiveness of quantity demanded to a one percentage change in price--and elasticity of supply--responsiveness of quantity supplied to a one percentage change in price). Depending on other factors, however, a market share as low as 40% might suffice. *Id.* (explaining that when demand and supply for a product are highly inelastic, a firm with only a 40% market share might be able profitably to charge double the competitive price).

"A relevant market [or the relevant geographic and product market] is the smallest market for which the elasticity of demand and supply are sufficiently low that a firm with 100% of that market could profitably reduce output and increase its price substantially." Hovenkamp, *supra*, Antitrust Law § 3.2. To understand the definition without the economist's jargon, imagine a Virginia producer of pickled watermelon which reduces output, raises price, and manages to reap a profit. If no producer from outside Virginia, lured by the supracompetitive price, provides consumers with out-of-state pickled watermelon, and no consumers, responding to the price increase, rush outside Virginia to obtain their delicacy, a relevant "geographic market" has been established. If no consumers switch from pickled watermelon to a comparable delicacy, such as pickled peaches, and no producers abandon production of a comparable good in favor

of pickled watermelon, a relevant "product market" has been established.

D. SECTION 2 LAW AND ECONOMICS APPLIED TO THIS CASE

1. MARKET SHARE IN THE RELEVANT MARKET

Grace admits--wisely so--that for purposes of Rule 12(b)(6) it is stuck with VVL's definition of product market (vermiculite concentrates), which disregards the existence of possibly close or virtually interchangeable substitutes for vermiculite concentrates. Similarly, under the strictures of 12(b)(6) Grace cannot contest VVL's assertion that foreign producers of vermiculite are nonresponsive to price fluctuations in the United States (the geographic market).[23] Given these facts, it is at least plausible to assume that demand for vermiculite is largely inelastic (because consumers need vermiculite and there are no good substitutes) and that elasticity of supply is also low (because foreign producers are nonresponsive to price increases and domestic producers cannot shift production toward vermiculite, which is essentially unavailable to them). Under this scenario, the quantity demanded by customers remains such that when output is reduced and price is increased (to a supracompetitive level), Grace profits and no would-be competitors step in to drive down price. Given these

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[23] In its April 21, 1995 Opposition to Defendants' Motion to Dismiss, VVL disavows any claim that its complaint alleges that Grace has violated Section 2 by monopolizing or attempting to monopolize the "vermiculite mining rights market" in Louisa County or South Carolina. *Id.* at 7 n.1. VVL alleges monopolization in the "vermiculite concentrates market." *Id.* Although this disavowal was made before VVL twice amended its complaint, nothing in its subsequent complaints indicates any intention to renounce this position. Therefore, the court confines its discussion to the United States vermiculite concentrates market.

circumstances, Landes and Posner teach that Grace's market share--alleged to be 57% in 1992--suffices to permit an exercise of monopoly power. Although Grace argues that its market share has declined, VVL's complaint does not reveal the percentage drop; nothing in the complaint allows the court to determine to a certainty that Grace's market share has fallen so low that, as a matter of law, VVL cannot prevail on its complaint.[24] Moreover, VVL finds itself in good company when it argues that a decline in market share does not automatically defeat a finding of monopoly power: "A decline in market share might indicate that market power exists and is being exercised." Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law § 835.2a (1995).

Although academics and courts often disagree, the great weight of precedent is consistent with this conclusion and the conclusion reached by Professor Landes and (now) Judge Posner. *See, e.g., United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948) (declining "to prescribe any set percentage of figures" because "the relative effect of percentage command of a market varies with the setting in which that factor is placed"); *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 201-02 (3d Cir. 1992) ("A predominant share of the market, or a lesser market share, *combined with other relevant factors*, may suffice to demonstrate monopoly power.") (emphasis added and citations omitted); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988) (indicating that it cannot be inferred as a matter of law that an antitrust defendant lacks monopoly power simply because of decline in his market share); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) ("Supreme

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[24] From the allegations in the complaint, it can be deduced that VVL owns 20% of vermiculite mining rights in the United States, HGSI owns 40%, and Grace owns 40%.

Court cases, as well as cases from this court, suggest that *absent special circumstances*, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization.") (emphasis added and footnote omitted); *Broadway Delivery Corp. v. United Parcel Service, Inc.*, 651 F.2d 122, 126-30 (2d Cir. 1981) (Newman, J.) (concluding that it was error for the district court to instruct jury that a finding of less than 50% of market share precluded finding of monopoly power because "the true significance of market share data can be determined only after careful analysis of the particular type of market"); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1352 & n.18 (5th Cir. 1980) (suggesting that approximately 50% might suffice with low number of competitors and high entry barriers); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980) ("Blind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition.").

Thus, insofar as Grace argues that a market share of 51-57%[25] precludes an inference of monopoly as a matter of law, Grace is mistaken. The cases cited by Grace are of little help, for none involve Rule 12(b)(6) dismissals. At a possible summary judgment phase, Grace may well prevail on its argument; many courts ultimately find 50-60% to be insufficient. *See, e.g., Fineman*, 980 F.2d at 201-02 ("A significantly larger share than 55 percent has been required to demonstrate prima facie monopoly power."); *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974) (stating that control of seventy to one hundred percent of the relevant market is the required range according to other

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[25] Because VVL's previous complaints alleged that Grace had 51% of the market, and the court had not granted VVL's motion to amend its complaint until the writing of this opinion, Grace has made arguments only with respect to the 51% figure.

case law). Perhaps if VVL had alleged that Grace's market share was below 30%, the court would be on steadier ground were it to dismiss VVL's monopolization claim. *See United States v. Aluminum Co. of America* ["*ALCOA*"], 148 F.2d 416-424 (2d Cir. 1945) (Hand, J.) (stating while 90 percent of the market "is enough to constitute a monopoly, it is doubtful whether sixty or sixty-four percent would be enough[,] and certainly thirty-three percent is not"); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968) (stating that 20% market share would not be sufficient); *but see Enerdex Lighting Industries, Inc. v. North American Philips Lighting Corp.*, 656 F. Supp. 914 (S.D.N.Y. 1987) (stating that just 25% might be sufficient). But the middle ground in which VVL's complaint places us removes the certainty that comes with a truly insignificant (for purposes of Section 2) market share, because, depending on the structure of the market, a producer could conceivably monopolize with a market share not far below fifty percent. Of course, whether the market structure is amenable to such monopolization cannot be explored on a Rule 12(b)(6) motion.

Given the court's conclusion that the market share alleged by VVL provides no basis upon which to dismiss its monopolization claim, *a fortiori* VVL's claim of attempted monopolization cannot be dismissed for lack of market share, because a lesser showing of market share can support an attempted monopolization claim. *See* Hovenkamp, *supra*, Antitrust Law § 6.5.

2. ANTICOMPETITIVE CONDUCT

To support a claim of monopolization or a claim of attempted monopolization an antitrust plaintiff must point to exclusionary or anticompetitive conduct engaged in by the defendant. VVL alleges that the donation (or suppression of

supply) from Grace to HGSI satisfies this requirement.[26] Grace urges that VVL's complaint fails on this front.

a. REFUSAL TO DEAL

Citing *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.* ["*NCEMC*"], 995 F.2d 1063, 1993 WL 193637 (4th Cir. 1993) (*per curiam*) (unpublished), *aff'g*, 1992-1 Trade Cas. (CCH) § 69,806 (M.D.N.C. 1992), Grace argues that it had no duty to deal with its competitor, VVL, and therefore cannot be held liable for having failed to do so. As with nearly all of the cases from which Grace seeks succor, NCEMC did not arise in the context of a Rule 12(b)(6) motion. The unremarkable proposition for which Grace cites NCEMC is that "'a firm with *lawful* monopoly power has no general duty to help its competitors.'" *Id.* at *3 (emphasis added) (quoting *Olympia Equipment Leasing*, 797 F.2d at 375).[27]

The court has no quarrel with the principle that competitors (including lawful monopolists) normally can refuse to deal at whim with rivals or to aid competitors. But Grace's argument that no such duty is imposed in this case begs the question. Section 2 imposes a duty to refrain from unlawful monopolization; if the donation (viewed as the intentional suppression of supply) from Grace to HGSI constitutes unlawful monopolization (and VVL has alleged that it does), then the duties imposed upon Grace are not governed by the normal principle.

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[26] Although we are accustomed to thinking of donations as desirable acts of generosity to be encouraged, not all donations are so benign. *See* David Foster Wallace, Infinite Jest 398-407 (1996).

[27] *NCEMC* deals with the "essential facilities doctrine," a doctrine by which a lawful monopolist might have a duty to deal with a rival if it controls a resource without which its rival cannot survive. VVL does not contend that the essential facilities doctrine comes into play in this case. *See* VVL's Objections of October 2, 1995, at 14-15.

The Supreme Court reaffirmed in *Aspen Skiing*, 472 U.S. at 585 (which academia has "overruled," *see* Hovenkamp, *supra*, Antitrust Policy § 7.5 (urging an extremely narrow view of the case); Kenneth L. Glazer & Abbott B. Lipsky, Jr., Unilateral Refusals to Deal Under Section 2 of the Sherman Act, 63 Antitrust L.J. 749 (1995) (criticizing approach taken by the Supreme Court in *Aspen Skiing* and citing scholars' theories narrowing scope of holding); Frank H. Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972 (1986) (questioning the economic underpinnings of *Aspen Skiing*)), that the right to decline to buy from or to sell to a competitor is not unqualified. A competitor's unilateral refusal to deal with rivals may violate Section 2 if the purpose or effect is to create or to maintain a monopoly. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 483 n.32 (1992) (citing *Aspen Skiing*) (stating that right to refuse to deal "is not absolute . . . [and] exists only if there are legitimate competitive reasons for the refusal"); *Aspen Skiing*, 472 U.S. at 600-11 (upholding jury verdict that rival's failure to continue cooperation in joint marketing arrangement with competitor violated Section 2); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (holding that refusal of newspaper to sell to customers who patronized radio competitor violated Section 2); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (indicating that refusal to sell may be actionable if it is done to achieve monopoly power in a second market).

In *Aspen Skiing*, the antitrust defendant owned three mountains used for downhill skiing in Aspen, Colorado; the antitrust plaintiff owned a fourth mountain in that area. To provide skiers with more flexibility and variety, the plaintiff and the defendant entered into a joint venture, which offered skiers an "all-Aspen" ticket that permitted them to use all four mountains. After several years of cooperation, the defendant withdrew from the deal, and the plaintiff's revenues dropped precipitously. In defending an antitrust suit brought by the plaintiff, the defendant insisted that it had no duty to deal

with its competitor. The Supreme Court rejected the argument that under no circumstances could such a duty be imposed. Relying on *Lorain Journal*, the Supreme Court rendered the defendant that, although most businesses have the "right" to choose with whom they deal, the right, as "[m]ost rights [, is] qualified. . . . [It] . . . is neither absolute nor exempt from regulation." *Aspen Skiing*, 472 U.S. at 601-02 (internal quotations and citation omitted). Indeed, the oft-forgotten contingency embedded in "rights" is demonstrated again and again in sundry antitrust cases. Making contracts, entering into joint ventures, merging with a rival, acquiring a supplier or a dealer, expanding production, and setting price are all "rights" that may be defeated by the antitrust laws. Thus, one has the "right" to refuse to deal so long as the refusal does not violate Section 2.

Grace emphasizes the differences between this case and the cases indicating the existence of a limited duty to deal. *Aspen Skiing*, Grace underscores, involved circumstances not present here: voluntary cooperation followed by a cessation in dealing. But this factor--a party's withdrawal from a pre-existing relationship--does not rise to the level of importance suggested by Grace's argument.[28] More than anything else, the existence of a joint venture served an evidentiary function: it supported the jury's conclusion that cooperation was profitable to both parties. The absence in this case of any previous cooperation may well become relevant at a subsequent stage in this case (i.e., summary judgment), but on a Rule 12(b)(6) motion it cannot be dispositive. The Court in *Aspen Skiing* made no indication that the prior cooperation with an antitrust defendant was a prerequisite to the plaintiff's claim; furthermore, the Court relied on *Lorain Journal* where previous cooperation was not an issue.

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[28] For a contrary view, see Herbert, *Federal Antitrust Policy* § 7.5 (1994).

Grace's stronger argument comes down to this: that *Aspen Skiing* is a bad decision and should be limited to its facts; in other words, when ski slopes, joint ventures, and Aspen, Colorado, are not involved, the rationale of *Aspen Skiing* should not govern. As mentioned above, commentators and lower courts have shown a similar distaste of *Aspen Skiing*. *Olympia Equipment Leasing*, 797 F.2d at 379 (Posner, J.) ("The *Aspen* [*Skiing*] decision, on which [the plaintiff] naturally rests the main weight of its argument, is narrowly written. If it stands for any principle that goes beyond its unusual facts, [the principle is not present here]."). This court sympathizes with the desire to narrow *Aspen Skiing* (for it takes a very broad view of Section 2), but, once again, Rule 12(b)(6) constrains the court. Even accepting that *Aspen Skiing* controls only the rarest case, it cannot be determined at this stage that the case before the court does not qualify. At the risk of repeating itself, the court observes that Rule 12(b)(6) permits dismissal only when *no* set of facts can be proven to support the plaintiff's complaint. To do more than speculate that *Aspen Skiing* will not apply would be premature. As the Fourth Circuit explained (in a case without skiing, prior cooperation, or Aspen), "[t]he [antitrust defendants] may be correct in their assertion that *Aspen Skiing* only . . . [applies] in very limited circumstances. Even if *Aspen Skiing* is so limited, it cannot be determined from the allegations of the plaintiff's complaints that such circumstances were not present [here]." *Advanced Health-Care*, 910 F.2d at 148 n.16 (citation omitted).

Furthermore, while VVL's Section 2 claims may appear to be tantamount to an assertion that Grace had an obligation to deal, a closer examination belies the notion that VVL's claims depend on the existence of a duty to deal. Part of the *remedy* VVL seeks would require Grace to deal; but the anticompetitive act VVL attacks is not necessarily Grace's failure to sell VVL its vermiculite holdings. Rather, VVL challenges as exclusionary Grace's donation or suppression of supply. The distinction may appear specious, but consider

that if, instead of donating its holdings to HGSI, Grace had sold them to a new market entrant (even one who had no intention of dealing with VVL), the nature of any Section 2 claim (assuming VVL would bring such a claim) would be very different from that presently before the court.

Nor is the court persuaded by the hypothetical that if Grace could have held on to the land perpetually without violating the antitrust laws, it can give the land to whomever it wishes, because the result of either action would be the same. The court knows of no exemption from antitrust liability for companies that buy up scarce resources only to ensure their disuse by fellow competitors (the worst case scenario). In any event, the court is relieved of deciding whether Section 2 liability would attach to this hypothetical case, because that is not the case before the court today. The case before the court involves a transfer effecting a substantial suppression of supply of a scarce resource by a firm alleged to have monopoly power. Such a suppression of supply may qualify as an exclusionary act, *see* Herbert Hovenkamp, *supra*, Antitrust Policy § 7.1, and, therefore, the court finds that VVL has adequately alleged anticompetitive conduct within the meaning of Section 2.

b. LEGITIMATE BUSINESS REASON

Grace urges that even if its donation to HGSI could otherwise be viewed as exclusionary and even if it had a limited duty to deal with VVL, its legitimate business reason in making the donation absolves it from antitrust liability. Grace turns against VVL its own concession: Grace received a "sizeable" tax deduction by acceding to HGSI's long-standing demands for its vermiculite holdings. This tax benefit, Grace contends, qualifies as a legitimate business reason justifying its conduct. *See City of Anheim v. Southern California Edison Co.*, 955 F.2d 1373, 1379 (9th Cir. 1992) (cautioning that "even when the monopolist does refuse aid partially because it wishes to restrict competition, "[the court]

determine[s] antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct") (internal quotations and citations omitted).

The court has given up its fears of undue repetition, for it has little choice but to echo its earlier rejoinder to Grace: whether Grace had a legitimate business reason for its conduct is a question of fact, not to be decided on a Rule 12(b)(6) motion; the allegation that it received a substantial tax deduction certainly supports Grace's position, but it does not conclusively undermine that of VVL. Hence, at least at this stage of the analysis, Grace cannot prevail on its "legitimate business justification" argument.

3. CAUSAL ANTITRUST INJURY

In deciding the question whether VVL has adequately alleged causal injury for purposes of Section 2, one cannot simply rest on the analysis performed in connection with VVL's Section 1 claim. Unlike with Section 1, VVL can now make the argument that Grace's unilateral decision to donate its holdings to HGSI proximately caused VVL's injury. From the allegations in VVL's complaint, it is possible to conclude that "but for" the donation to HGSI, Grace might have sold its vermiculite holdings to VVL. First, Grace agreed to entertain an offer from VVL; second, Grace may well have been reluctant to incur the cost of holding on to land without putting it to any productive use; and third, the complaint mentions no interested parties other than HGSI and VVL.

Grace suggests, however, that VVL has failed adequately to plead antitrust injury. This argument cannot be accepted. VVL, as a consumer of vermiculite mining rights, suffers from reduced availability and higher prices of vermiculite mining rights. As a producer of vermiculite concentrates, VVL has alleged that the suppression of scarce vermiculite

supply has caused a decline in the value of its business.[29] The injury to VVL mirrors the potential injury to consumers of vermiculite concentrates, who may face reduced availability and higher prices of vermiculite concentrates. These types of injuries are precisely the kind that the Sherman Antitrust Act seeks to prevent. Accordingly, the court finds that VVL has adequately alleged antitrust injury.

4. ANTICOMPETITIVE INTENT NECESSARY FOR ATTEMPTED MONOPOLIZATION

In an argument reminiscent of its "legitimate business reason" defense, Grace contends that any allegation of anticompetitive intent on its part is refuted by its invitation to VVL to make an offer for its vermiculite holdings. Rule 12(b)(6) does not provide the appropriate forum to resolve this factual dispute. While VVL's complaint does not allege the offer was a sham, neither does the complaint contain any allegation that forecloses such a possibility. To the contrary, VVL alleges Grace had the requisite anticompetitive intent. Hence, the court rejects Grace's argument that VVL has failed to plead anticompetitive intent required for attempted monopolization and conspiracy to monopolize claims.

5. AGREEMENT BETWEEN HGSI AND GRACE FOR CONSPIRACY TO MONOPOLIZE

a. HGSI

For the reasons stated in Part IV.A.1-3, the claim alleging that HGSI violated 15 U.S.C. § 2 by entering into a

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[29] The court notes that, at least in the short term, it is not implausible to assume that VVL may benefit from a suppression in supply; a reduction in output resulting in a price increase will redound to the benefit of VVL, whose vermiculite will command higher prices. Were this the only "injury" that appeared possible from VVL's complaint, VVL would not be deemed to have suffered antitrust injury.

conspiracy to monopolize must be dismissed. *See DELTA*, 50 F.3d at 714 (holding that neither Section 1 nor Section 2 applied because the defendant did not engage in trade or commerce).

b. GRACE

For the reasons stated in Part IV.A.4, Grace cannot escape liability for allegedly conspiring to monopolize under 15 U.S.C. § 2 only by virtue of the fact that HGSI cannot be held liable under that section. *See Advanced Health-Care*, 910 F.2d at 150.

6. LACHES

The Clayton Act furnishes a statute of limitations for damages claims, 15 U.S.C. § 15b (four-year statute of limitations); it provides no statute of limitations for plaintiffs who request only injunctive relief. Grace argues that laches bars VVL from seeking divestiture because the face of its complaint reveals it to be guilty of unjustified delay: although, according to the complaint, VVL learned of Grace's intention to donate its holdings in 1992, VVL failed to file suit until 1995. VVL, armed with case law from the Ninth Circuit, counters that generally the defense of laches must fail if suit is brought within the statute of limitations supplied in the Clayton Act for damages actions. *See Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689, 694 (9th Cir. 1982).

The court is less convinced by the legal rule than by the ambiguities in VVL's complaint. On the one hand, a significant time lag separated Grace's first donation to HGSI and VVL's attack upon the donation, and the court has little trouble crediting Grace's claims of prejudice. On the other hand, other facts alleged in VVL's complaint indicate that there may have been excusable reason for its delay: for instance, the parties were involved in state court proceedings relating to the conveyances, and VVL may have been awaiting their conclusion. Grace paid only cursory attention

to this issue in its brief, leading the court to conclude that resolution of the laches issue should be postponed until a possible summary judgment phase.

7. DISPOSITION OF SECTION 2 CLAIMS

Because VVL has colorably alleged all elements necessary to support a claim against Grace for monopolization, attempted monopolization, and conspiracy to monopolize, the court holds that VVL's Section 2 claims cannot be dismissed on a Rule 12(b)(6) motion. Lest this conclusion overwhelm the narrowness of the court's holding, the court reiterates that Rule 12(b)(6) does not kill cases easily; it would be an overly broad construction of Rule 12(b)(6) to interpret it as a filter of a dubious claims. Those who read this opinion as ushering in an expansive era of Section 2 liability for corporate donations, refusals to deal, or attempted withdrawals from the market are guilty of a misreading. The court's holding is far less remarkable. The court merely holds, on the facts of this case, (1) that a market share of fifty percent (or somewhere below fifty percent) alone does not conclusively foreclose the possibility of monopoly power, and (2) that a competitor's suppression of a substantial supply of a scarce and valuable resource may constitute an anticompetitive act under Section 2.

VII. VVL'S STATE LAW CLAIMS

A. CLAIMS UNDER THE VIRGINIA ANTITRUST ACT

The Virginia Antitrust Act prohibits "[e]very contract, combination or conspiracy in restraint of trade or commerce," Va. Code § 59.1-9.5, and "[e]very conspiracy combination or attempt to monopolize, or monopolization of, trade or commerce." *Id.* § 59.1-9.6. VVL's claims under the Virginia Antitrust Act are governed by the same standard as its claims under the Sherman Antitrust Act. *See Satellite Television & Assoc. Resources v. Continental Cablevision, Inc.*, 714 F.2d

351, 35 8 n.13 (4th Cir. 1983). Therefore, VVL's claims under the Virginia Antitrust Act must be dismissed, except insofar as they allege unlawful monopolization, attempted monopolization, and conspiracy to monopolize against Grace; claims under § 59.1-9.5 are dismissed and claims under § 59.1-9.6 remain against Grace. For the same reasons that HGSI cannot be held liable under the Sherman Antitrust Act, it cannot be held liable under the Virginia Antitrust Act.

B. CLAIMS FOR CIVIL CONSPIRACY UNDER VIRGINIA STATE LAW

Section 18.2-499 of the Virginia Code criminalizes the combination of any two people who "act in concert together for the purpose of . . . willfully and maliciously injuring another in this reputation, trade, business or profession by any means whatever." The parties agree that civil liability attaches only when the plaintiff can demonstrate that the defendants "contrived to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Carpenter v. Drechsler*, 1991 WL 332766, *8 (W.D. Va. 1991) (internal quotations and citations omitted) (Michael, J.), *aff'd mem.*, 19 F.3d 1428 (4th Cir. 1994). Under this standard, HGSI cannot be held liable for civil conspiracy because the court has found, as a matter of law, that the only claim of illegal conduct against it must fail. Grace, however, can be held liable under § 18.2-499, because VVL has alleged that its conduct was illegal, and the court has determined that these allegations survive the Rule 12(b)(6) stage.

VIII. PEERS' STATE LAW CLAIMS

As Grace indicates, a Rule 12(b)(6) motion will not be converted into a motion for summary judgment pursuant to Fed. R. Civ. P. 56 if a document referenced within a complaint is considered by the court. *Gasner v. County of Dinwiddie*, 162 F.R.D. 280, 282 (E.D. Va. 1995). Hence, the court will consider, in analyzing Grace's motion to dismiss, the contract referenced in the Peers' complaints. The Peers

suggest that the court consider--in addition to the facts alleged in the complaints, the contractual agreements, and the governing law--a hypothetical layperson's reaction to the Peers' allegations. The court believes an exercise focusing on a hypothetical layperson, aside from being wholly unproductive, would not be appropriate; the court's job in this case is to apply law to facts, not to speculate about what an average person on the street feels about contract law.

A. UNJUST ENRICHMENT

Under Virginia law, the existence of an express contract governing a transaction between parties bars a claim for unjust enrichment (a form of implied or quasi-contract) based on that transaction. *See Bright v. QSP, Inc.*, 20 F.3d 1300, 1306 (4th Cir. 1994) (citing *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 946 (4th Cir. 1988) (*per curium*)). As discussed above, Grace and the Peers entered into an express contract for the sale of the Peers' farm land. Grace's contract with both sets of Peers left it with unfettered discretion to mine or not to mine; review of both agreements reveals that both parties had foreseen the possibility that Grace might never mine. Grace's June 18, 1996 Motion to Dismiss, Exhibits E & G. According to the agreement with Peers I, the decision whether to mine was "within the sole discretion of [Grace]"; the agreement specifically relieved Grace of any "legal obligation" to mine. Exhibit E, § 5(A). Further, the agreement contemplated that Grace might never mine, for the agreement imposed upon Grace the duty to notify the Peers I if the land were resold, because, "[p]rovided there ha[d] been no mining whatsoever of the premises," the Peers I had the option of purchasing the land from Grace. *Id.* 1 (C). The agreement with Peers II paralleled the contract with Peers I with respect to discretion bestowed upon Grace: mining was "at the sole option of [Grace]." Exhibit G, p.3.

The Peers concede that generally an injured party cannot recover on an implied or quasi–contract theory in the face of an express contract. They make no argument that Grace ever

had any obligation to mine. Nor do the Peers dispute that the agreement between themselves and Grace permitted Grace to dispose of the holdings by contracting with a third party. *See* Peers' July 23, 1996 Opposition at 8. The Peers insist, however, that claims for unjust enrichment are not barred by an express contract unless such claims contravene the express contractual terms. Because nothing in their express agreements anticipated Grace's "trick," urge the Peers, a claim for unjust enrichment is not contrary to the express terms and is thus permitted under Virginia law. Although the Peers cite *Nedrich v. Jones*, 245 Va. 465, 477 (1993), to support this argument, *Nedrich* does not stand for any such proposition. As Grace points out, if anything, *Nedrich* teaches to the contrary. In that case, the employer expressly promised to pay an employee a bonus for all leases executed by the employer; a lease was executed, but the employee received no bonus payment. The court in *Nedrich* ruled that, pursuant to the contract, this was proper, because the employer's general partnership, and not the employer, was shown to have executed the lease, and therefore the employer was found to have no obligation to pay the employee a bonus. An extra-contractual cause of action was not allowed, although nothing in the contract indicated that the employee anticipated this seemingly technical distinction between the employer and his partnership (or, in the Peers' language, "trick").

The Peers seize upon a lone sentence in *Nedrich*, with which they attempt to bolster their untenable position. The court states that "[t]he law will not impose an implied contractual relationship upon the parties *in contravention* of an express contract." 245 Va. at 477 (citation omitted and emphasis added). *Nedrich* did not elaborate on the precise definition of "contravention"; thus, the Peers step into its shoes. So narrow is their construction of the term, that, with their interpretation, virtually any plaintiff claiming unjust enrichment could circumvent the rule permitting recovery on the express contract only. For instance, in this case, the Peers would have the court hold that no express contractual clause

governed the donation by Grace, because the agreements between the parties never mentioned the possibility of such a donation or the tax deduction that accompanies it. The parties' failure to refer in their agreements to a possible donation or tax deduction is of little consequence. The contracts defined the duty to pay royalties, and it is the alleged breach of those duties that the Peers challenge. The question whether the contracts countenance Grace's "trick" must be reserved as a matter of contractual interpretation.

The Peers' final argument is based on selected quotations from *Texas Company, Inc. v. Northrup*, 154 Va. 428 (1930), a case which the Peers tear from its context in an ill-fated effort to assist its reasoning to fit this very different case. In *Northrup*, the Virginia Supreme Court held merely that a "total or substantial failure of consideration," so flagrant that the court inferred that the defendant-appellant was guilty of "duress[,] . . . actual fraud in the procurement[,] . . . [or] constructive fraud," entitled the injured party to rescission. 154 Va. at 444-45. The defendant-appellant and plaintiff-appellee had entered into three separate agreements on the same date; two of the agreements contained termination clauses, but the third did not. The defendant-appellant exercised its right of termination on the former agreements but refused to terminate the latter agreement. This ploy permitted the defendant-appellant to extract all benefits from the three agreements (which the court interpreted in unison) while depriving the plaintiff-appellee of any benefit. This result, the court reasoned, could only have been achieved by (constructively) fraudulent means, because the plaintiff-appellee bore all the costs of the transaction and received no gain. Here the parties' agreements contemplated the possibility that Grace would never mine the land; indeed, in the twenty years preceding the donation, Grace did not mine, and the Peers did not complain. *See* Peers' July 23, 1996 Opposition at 14. Thus, there can be no serious assertion that the contracts fail for lack of consideration, let alone a failure of consideration from which (constructive) fraud may be

inferred. To the extent counsel for Peers suggest otherwise, their efforts are unavailing. Consequently, the Peers' unjust enrichment claim must be dismissed; if the Peers are to have a remedy, it must be gotten from the express contracts into which they entered with Grace.

B. BREACH OF CONTRACTUAL DUTY TO EXERCISE DISCRETION IN GOOD FAITH

The Peers argue that Grace breached its contractual duty to exercise its discretion not to mine in good faith. Grace responds that no duty of good faith can be implied when such a duty would contradict the express agreement governing the transaction. The parties agree on the law: contractual duties should be exercised in good faith, but a duty of good faith cannot be implied so as to trump an express contractual provision. *Mahoney v. NationsBank of Virginia*, 249 Va. 216 (1995). The only issue is whether the agreements between Grace and the Peers expressly authorized Grace to make a donation to HGSI with the proviso that HGSI never mine the land.

Mahoney and the more recent case of *Charles E. Brauer Co. v. NationsBank*, 251 Va. 28 (1996), provide insight on this question. Both cases indicate that clear contractual language should be given its plain meaning; *Mahoney* and *Brauer* support this court's view that "sole discretion" means what it says. In *Mahoney*, the Virginia Supreme Court for the first time considered whether an express contractual right to exercise discretion could be challenged for "[un]reasonable[ness], . . . [im]proper motiv[ation], . . . arbitrari[ness, or simply because the discretion was exercised] in a manner inconsistent with the parties' reasonable expectations." 249 Va. at 219. The Virginia Supreme Court concluded that imposition of such requirements would be inconsistent with the very notion of discretion, a right to act at will without justification. Examining case law from other jurisdictions, *Mahoney* cited with approval a Second Circuit

case holding that an agreement providing for "[t]ermination . . . by either party with 30 days' written notice," left no room for a claim that the termination was exercised in bad faith. *Id.* at 220 (citing *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 674 (2d Cir. 1985)). Following the reasoning of *Mahoney*, the Virginia Supreme Court in *Brauer* declined to erode the right of discretion by grafting upon the right a duty to act nonarbitrarily. 251 Va. at 35 (agreeing with the plaintiff-appellant that the defendant-appellee's exercise of discretion was "[a]rguably . . . arbitrary," but rejecting the notion that the defendant-appellee had a duty to exercise its contractual right of discretion nonarbitrarily).

The agreements between Grace and the Peers specifically state that Grace, solely at its discretion, will decide whether to mine. Even if its decision permanently to foreclose mining was exercised in bad faith or contrary to the Peers' expectations, Grace nonetheless had the right to exercise its discretion as it liked. Grace bargained for this important contractual right and should not be robbed of it. The Peers attempt to evade the applicable law by arguing that nothing in the contract granted Grace the right to donate the property in return for a tax deduction. This borders on the ridiculous. How Grace used the property once it decided not to mine is irrelevant. Grace's decision not to mine need not be justified by any reason, and, therefore, cannot be defeated by a "bad" reason. For this same reason, the Peers claim that Grace could have "passively" declined to mine, but could not achieve this same result "actively" must fail. Moreover, the active/passive distinction, while not infrequently surfacing in the case law, does little to advance the discussion, since, as the legal realists have shown us, anything can be characterized and recharacterized as passive or active. *Cf.* Louis Michael Seldman, The State Action Paradox, 10 Const. Comment. 379, 398 (1993). Therefore, the Peers' claim that

Grace breached an implied duty of good faith must be rejected and the claim dismissed.[30]

C. BREACH OF CONTRACTUAL DUTY TO PAY ROYALTIES OR CONSTRUCTIVE MINING

Constructive eviction, constructive discharge, constructive taking; 'why not constructive mining?' query the Peers. This heretofore unheard of cause of action would enable the Peers to recover royalties for vermiculite that had never actually been mined by Grace or HGSI on the theory that Grace received all the benefits it would have gained by mining the land but without compensating the Peers, as it would have had to do had Grace actually mined the land. Even if the court were inclined to recognize the unprecedented cause of action of "constructive mining," this would not be the case to do it. Pursuant to the express contract, Grace had every right to transfer the land to a third party and ~~r~~eceive in exchange compensation (whether in the form of a tax deduction or a sale price) for the value of the land and the minerals beneath it, even with the knowledge that the third party would never mine the land. To force Grace to disgorge the benefits of its transfer to HGSI would have the same effect as would imposing upon Grace a duty to exercise its discretion in good faith. Therefore, the Peers' constructive mining must be dismissed.

D. WASTE AND CONVERSION

The Peers' last claims are, alternatively, waste (applicable to real property) or conversion (applicable to personal

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[30] The Peers rely on a Virginia state law decision (to which HGSI, but not Grace, was a party) holding that failure to mine, even in the face of a "sole discretion" clause, is subject to a duty of good faith. That court, however, did not have the benefit of *Mahoney v. NationsBank of Virginia*, 249 Va. 216 (1995), and *Charles E. Brauer Co. v. NationsBank*, 251 Va. 28 (1996).

property). Waste is "[a] destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate." *Chosar Corp. v. Owens*, 235 Va. 660, 663 (1988). Conversion is "[a]n unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Black's Law Dictionary 332 (6th ed. 1990). Without an allegation of wrongful conduct, there can be no cause of action for waste or conversion. *See Vicars v. Virginia Bank-Mountain Empire*, 250 Va. 103, 109 (1995); *Kavanaugh v. Donovan*, 186 Va. 85, 91 (1947) (waste); *Acorn Structures*, 846 F.2d at 926 (conversion). As discussed above in connection with the Peers' other state law claims, Grace's donation to HGSI was authorized by the agreements between Grace and the Peers. Therefore, as a matter of law, neither the Peers' claim for conversion nor waste can stand.

IX. SUMMARY

The circumstances in the case brought by VVL distinguish it from most antitrust cases. The court does not anticipate that it (or other courts) will often encounter such a curious mix: a scarce, valuable resource donated to an entity which vows never to use it; a corporation whose profits are, in part, derived from exploitation of the resource it has permanently surrendered; and a rival which resolves to reverse the transaction in order to extract the resource. All the makings of a mystery novel are contained in this strange brew. The court's holding should not be viewed in isolation, without reference to the unique nature of this case, particularly insofar as VVL's Section 2 claims are concerned.

Having sounded this cautionary note, the court states as follows. HGSI is dismissed as a defendant in this case. All claims brought by the Peers are dismissed. Count I of VVL's complaint is dismissed; insofar as Count V asserts an unlawful conspiracy in restraint of trade (comparable to

Section 1 of the Sherman Antitrust Act), it is dismissed. The following counts remain against Grace: Count II (monopolization under the Sherman Antitrust Act), Count III (attempted monopolization under the Sherman Antitrust Act), Count IV (conspiracy to monopolize under the Sherman Antitrust Act), Count V (monopolization, attempted monopolization, and conspiracy to monopolize under the Virginia Antitrust Act), and Count VI (conspiracy to injure another in trade, business, or profession). The case is remanded to the Magistrate for further proceedings consistent with this Memorandum Opinion. All are urged to expedite this litigation, which has dragged on far too long.

An appropriate Order shall this day issue.

ENTERED: /s/ James H. Michael, Jr.
United States District Judge

April 22, 1997
Date

APPENDIX C

The Sherman Antitrust Act, § 1, 15 U.S.C. § 1 provides as follows:

§ 1. Trusts, etc., in restraint of trade illegal, penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX D

The Internal Revenue Code, 26 U.S.C. § 170, provides in pertinent part:

§ 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) Allowance of deduction.

(1) General rule.

There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary.

* * *

(f) Disallowance of deduction in certain cases and special rules.

(1) In general.

No deduction shall be allowed under this section for a contribution to or for the use of an organization or trust described in section 508(d) or 4948(c)(4) subject to the conditions specified in such sections.

* * *

(3) Denial of deduction in case of certain contributions of partial interests in property.

(A) *In general.* In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust. For purposes of this subparagraph, a contribution by a taxpayer of the right to use

property shall be treated as a contribution of less than the taxpayer's entire interest in such property.

(B) *Exceptions*. Subparagraph (A) shall not apply to--

(i) a contribution of a remainder interest in a personal residence or farm,

(ii) a contribution of an undivided portion of the taxpayer's entire interest in property, and

(iii) a qualified conservation contribution.

* * *

(h) Qualified conservation contribution.

(1) In general.

For purposes of subsection (f)(3)(B)(iii), the term "qualified conservation contribution" means a contribution--

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

(2) Qualified real property interest.

For purposes of this subsection, the term "qualified real property interest" means any of the following interests in real property:

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

(3) Qualified organization.

For purposes of paragraph (1), the term "qualified organization" means an organization which--

(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

(B) is described in section 501(c)(3) and--

(i) meets the requirements of section 509(a)(2), or

(ii) meets the requirements of section 509(a)(3) and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) Conservation purpose defined.

(A) *In general.* For purposes of this subsection, the term "conservation purpose" means--

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) the preservation of open space (including farmland and forest land) where such preservation is--

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.

(B) *Certified historic structure.* For purposes of subparagraph (A)(iv), the term "certified historic structure" means any building, structure, or land area which--

(i) is listed in the National Register, or

(ii) is located in a registered historic district (as defined in section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the

time of the transfer or on the due date (including extensions) for filing the transferor's return under this chapter for the taxable year in which the transfer is made.

(5) Exclusively for conservation purposes.

For purposes of this subsection--

(A) *Conservation purpose must be protected.* A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

(B) *No surface mining permitted.*

(i) *In general.* Except as provided in clause (ii), in the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

(ii) *Special rule.* With respect to any contribution of property in which the ownership of the surface estate and mineral interests has been and remains separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.

(6) Qualified mineral interest.

For purposes of this subsection, the term "qualified mineral interest" means--

(A) subsurface oil, gas, or other minerals, and

(B) the right to access to such minerals.

Supreme Court, U.S.
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MAR 15 1999
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No. 98-1289

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

HISTORIC GREEN SPRINGS, INC.,
Petitioner,
v.
VIRGINIA VERMICULITE, LTD., ET AL.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review a factbound application of the well-established antitrust doctrine excluding noncommercial restraints, which the Fourth Circuit expressly found consistent with all other circuit decisions interpreting this doctrine, correctly ruling that this doctrine was not satisfied on the highly unusual facts of this case where: (a) to evade an antitrust duty to deal, a monopolist made a donation coupled with anticompetitive restraints foreclosing a huge market share of an input vital to the monopolist's only rival, (b) the anticompetitive purpose was patent on the face of the donative restraints because they targeted anticompetitive concerns over preservationist ones, and (c) the donee knew its agreement was necessary to this anticompetitive objective and received a significant financial gain for agreeing to join the anticompetitive scheme?

2. Should this Court review a meritless claim -- which was never raised by petitioner below and never addressed by the Fourth Circuit or any other court -- that the application of federal antitrust law to the unusual commercial activity in this case is implicitly repealed by a federal tax provision governing completely different conduct?

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Respondent Virginia Vermiculite, Ltd., respectfully requests that this Court deny the petition for a writ of certiorari, which seeks review of the Fourth Circuit's decision holding that petitioner enjoys no immunity from antitrust suit on the particular facts of this case.

STATEMENT OF THE CASE

In a decision that not a single judge on the Fourth Circuit found merited en banc review, App. 16a, a unanimous Fourth Circuit panel correctly found that the well-established noncommercial exception to Sherman Act §1 was not satisfied on the highly unusual facts of this case. App. 9a-12a. Those facts merit restating because the petition misstates those facts, misleadingly obscures the anticompetitive scheme, falsely characterizes the holding below and claims it recognized a conflict with other circuits, and misleadingly implies petitioner raised an issue below that in fact it never raised till now.

1. The Highly Unusual Facts. There are only two domestic producers of processed vermiculite, which can be mined and processed in only two domestic locations: South Carolina and Virginia. App. 3a-4a. Because of the weight of raw vermiculite, it must be processed within a few miles of the mines. App. 22a; JA 571-72.[1] Grace is a vermiculite monopolist that mines and processes vermiculite only in South Carolina. App. 4a.

Although it never mined or processed vermiculite in Virginia, Grace bought up 80% of the vermiculite deposits in Virginia in the 1970s and proceeded to suppress their use for the next 20 years. *Id.* By the 1990s, Grace's only domestic rival -- Virginia Vermiculite -- was about to run out of its Virginia deposits and wanted to buy Grace's unused vermiculite deposits. *Id.*

The situation left Grace in something of a bind. If Grace sold Virginia Vermiculite the deposits, Virginia Vermiculite would stay in business and create real competition for Grace in the vermiculite market. But if Grace retained the deposits unused,

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[1] "JA" refers to the Joint Appendix before the Fourth Circuit. "App." refers to the appendix to the petition for certiorari.

Grace would presumptively have faced antitrust liability under the doctrine that a monopolist who refuses a rival access to a useful resource violates antitrust law if motivated by the refusal's exclusionary effect rather than legitimate business purposes.[2] Indeed, Grace would almost certainly have faced antitrust liability under the special doctrine prohibiting a monopolist from buying up and suppressing necessary inputs to keep them from its rivals.[3] Given that this antitrust doctrine applies even for duplicable inputs like plants, supplies, and personnel, then it certainly would have applied where (as here) the suppressed inputs are nonduplicable natural resources.

To evade its antitrust duty as a monopolist, Grace had to sell or transfer its deposits to someone else. But it knew that anyone else who had the deposits would have financial incentives to resell them for their most valued use: vermiculite mining. Grace then came up with the ingenious idea of making a strategic donation to continue Grace's suppression of these deposits. Pursuant to this anticompetitive scheme, Grace and petitioner agreed that Grace would donate all the deposits to petitioner.

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[2] *Aspen Skiing v. Aspen Highlands*, 472 U.S. 585 (1985); *Lorain Journal v. United States*, 342 U.S. 143, 155 (1951); *Eastman Kodak v. Image Tech.*, 504 U.S. 451, 483 n.32 (1992); App. 8a.

[3] *See United States v. American Tobacco*, 221 U.S. 106, 183 (1911) (monopolization proven by the "persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade"); *American Tobacco v. United States*, 328 U.S. 781, 803-04 (1946) (defendants monopolized by buying unneeded tobacco to keep it from rivals); III AREEDA & TURNER, ANTITRUST LAW ¶604, at 8 (1978) ("buying rival plants in order to close them constitutes monopolizing behavior"); *id.* ¶731d, at 250 ("It would clearly be exclusionary for a monopolist . . . to acquire supplies obviously in excess of his needs"); *id.* ¶707c, at 110 ("Acquiring talent not to use it but to deny it to possible rivals is exclusionary"); *Universal Analytics v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990) (same); *Midwest Radio v. Forum Publishing*, 942 F.2d 1294, 1297 (8th Cir. 1991) (same).

App. 4a-5a. But Grace did not trust petitioner not to resell or mine the property itself. Instead, as a condition of the transfer, Grace and petitioner agreed to restraints preventing vermiculite mining on the donated land. App. 5a.

Grace's purpose was thus anticompetitive, which was well-known by the petitioner. App. 4a-5a, 11a. Indeed, two other features emphasized that -- on its very face -- the patent purpose of this duty-evading donative restraint was anticompetitive, not preservationist. Grace and petitioner agreed to modify the original restraint -- which would have prohibited all mining -- to prohibit only vermiculite mining. App. 25a; JA 578-79. Since other mining poses an equal threat to preservation, the modification clearly indicated that petitioner wanted the freedom to deviate from the pure preservationist principles it here espouses, and that Grace did not really care about preservation as long as the mining that posed a competitive threat to it (vermiculite mining) was prohibited. Furthermore, apparently worried that post-mining reclamation might make vermiculite mining consistent with preservation, Grace and petitioner agreed that the prohibition on vermiculite mining applied even if reclamation eliminated preservationist objections by completely restoring the land to its prior state. App. 24a; JA 577.

In short, the restraints attached to the duty-evading donation were modified to prohibit vermiculite mining even when it does not cause preservation problems and to permit non-vermiculite mining even when it does. The anticompetitive purpose of the transaction was thus obvious on the face of the donative restraint.

Further, petitioner had a clear financial interest in this transaction. In return for agreeing to help Grace achieve its anticompetitive purpose, petitioner received nearly 1400 acres of land, much of which it re-sold for monetary gain. App. 4a-5a, 7a-8a, 11a. The agreement also furthered the financial interests of petitioner's management and members, who owned property whose value would have suffered if the agreement had not prevented hundreds of acres from being added to the local supply

of marketable property. App. 7a-8a, 11a; JA 575. Indeed, as the Fourth Circuit observed, the mere fact that the parties found it necessary to prohibit petitioner from engaging in vermiculite mining suggested petitioner had goals other than eliminating such mining. App. 8a.[4]

2. The Proceedings Below. The Fourth Circuit below correctly held that these facts alleged an agreement in restraint of trade, and that petitioner enjoyed no antitrust immunity under the doctrine excluding noncommercial restraints. App. 6a-12a. But petitioner is wrong to repeatedly -- and falsely -- assert that the Fourth Circuit acknowledged its decision conflicts with decisions from other circuits. Pet. 2, 7. The Fourth Circuit did no such thing. To the contrary, it explicitly considered these decisions from other circuits and concluded that its decision was fully consistent with them. App. 10a. The Fourth Circuit recognized that these other circuits were correct that the plain language of Sherman Act §1 does not cover "noncommercial behavior." *Id.* The Fourth Circuit simply made a fact-specific determination that the behavior in the case at hand was commercial, and thus not within the doctrine excluding restraints on noncommercial activity that the Fourth Circuit joined other circuits in recognizing. App. 10a-12a.

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[4]The Fourth Circuit decision reviewed a complaint dismissal and thus properly decided the case based on the facts alleged in that complaint. In contrast, the petition for certiorari improperly goes outside the appellate record to assert facts that are not contained in the complaint and that Virginia Vermiculite vigorously disputes. For example, the petition asserts that: (1) petitioner's motive was not financial but rather solely to preserve and protect the land; (2) petitioner's agreement prevented a form of strip-mining that would cause irreparable harm to preservationist values; and (3) the actual purpose for bringing this suit was to drive petitioner out of existence rather than to correct the anticompetitive harm. Pet. i, 2, 4, 18, 27. These unilaterally asserted facts are neither true nor part of the appellate record, and thus cannot form a basis for this Court's certiorari review.

Petitioner is also wrong to mischaracterize the Fourth Circuit as holding that a nonprofit's "mere" acceptance of a donation for noncommercial purposes is commercial conduct subject to antitrust scrutiny. Pet. 7-9. Instead, the Fourth Circuit decision emphasized that: (a) this was no "mere" donation but a donation that evaded a monopolist's antitrust duty to deal and was coupled with anticompetitive restraints foreclosing a huge market share to the monopolist's only rival; and (b) the transaction did not involve "mere" noncommercial purposes because the transaction had an anticompetitive purpose that the donee knew about and had a financial interest in furthering, given that the donee received significant financial gains for agreeing to help the monopolist further that anticompetitive purpose. App. 4a-5a, 8a, 11a-12a.

Petitioner also misleadingly implies that below it raised the issue of whether I.R.C. §170(h) precludes the application of federal antitrust law to its conduct. Pet. 19-20. In fact, petitioner never raised this issue below. Instead, the issue was raised below only in an amicus brief, and was thus properly never considered or discussed by the Fourth Circuit.

REASONS FOR DENYING THE WRIT

It is not surprising that no judge on the Fourth Circuit either dissented from this opinion or found it worthy of en banc review. This case involves the correct but factbound application of an undisputed legal standard to particular facts that are so unusual they are highly unlikely to recur.

There is even more reason why the petition for certiorari should be denied. U.S. SUPREME COURT RULE 10 counsels that normally certiorari is appropriate only when there is a legal conflict either between the lower appellate courts or between one such court and decisions of this Court. There is no such conflict in this case. On the noncommercial restraint issue, the Fourth Circuit decision instead correctly ruled that its decision was completely consistent with all rulings in other federal circuits.

App. 10a-12a. On the purported tax exception issue, petitioner does not even allege such a conflict, nor could it since no court (including the one below) has ever ruled on this issue.

This is simply not the sort of case that merits an allocation of the scarce resources this Court has to devote to reconciling conflicting lower court decisions. Even less can we say that the case presents issues that have percolated in the lower courts and reached a stage where the existence of multiple decisions and extensive legal analysis renders a conflict ripe for this Court's consideration. All the circuits recognize the doctrine excluding noncommercial restraints, but the Fourth Circuit is the only one to consider whether that doctrine applies to the unusual sorts of facts alleged here. And no circuit -- including the Fourth -- has ever rendered an opinion on the purported issue of whether I.R.C. §170(h) ever impliedly repeals some applications of federal antitrust law.

Even if this Court were in the business of deciding issues before any lower-court conflict had arisen, the issues here would not be appropriate for this Court's review. On the doctrine excluding noncommercial restraints, petitioner argues that a mere donation with purely noncommercial purposes should not be deemed commercial. Pet. 7-9. But this would be an extremely poor test case to develop this proposition for petitioner does not meet its own proposed standard. Rather, it is basically arguing that the Fourth Circuit was wrong to conclude that the transaction here involved neither a mere donation nor purely noncommercial purposes. "A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law" *See* U.S. SUPREME COURT RULE 10. On the alleged antitrust exemption created by I.R.C. §170(h), there was no discussion in the lower court at all because the issue was never raised by petitioner. The issue was thus not properly preserved on appeal, and in any event has not received the sort of briefing below that would make it appropriate for review by this Court.

Finally, even if the issues were appropriate for decision by this Court, petitioner is manifestly wrong on both issues. While donations to charities are normally noncommercial, the Fourth Circuit was clearly correct that this transaction differed from a normal donation in way that made it essentially commercial. Donations do not normally: evade a donor-monopolist's antitrust duty, come coupled with restraints that patently further not charitable goals but the anticompetitive goal of foreclosing a huge market share to rivals, and involve a financial payoff to the receiving charity for agreeing to join the anticompetitive scheme. This case appears to be the only one of its kind The decision below in no way threatens normal noncommercial donations that do not have these peculiar features.

The argument that a tax subsidy creates an antitrust exemption utterly fails to rebut this Court's heavy presumption against implicit antitrust exemptions. Indeed, it rests on the palpably false premise that, to get its tax deduction, Grace had to impose restrictions on the property it gave petitioner. In fact, the mere giving away of property to a charity is clearly sufficient to get a tax deduction, as anyone who has given property to a charity knows. The tax code cited by petitioner applies instead to the entirely different situation where the party seeking the tax deduction *keeps* the property, and donates away only a *partial* interest (like an easement) on that property. In such cases, the tax code quite sensibly requires some proof that the easement imposes a real restriction on the purported donor who retains the property. This provision does not apply where, as here, the donor gives away its entire interest in the property.

I. There Is No Conflict in Authority on the Noncommercial Restraint Doctrine. The circuits all agree that the Sherman Act excludes restraints on noncommercial activity. This case just involves the factbound question of whether this particular restraint fits within this doctrine. To avoid this problem, petitioner tries to frame the decision below as in

conflict with a purported doctrine that nonprofits acting with noncommercial purposes are immune from antitrust scrutiny for any restraint of trade coupled with a donation. Pet. 7-8. But no case has ever so held, and thus there is no conflict in authority on the issue petitioner raises. To the contrary, the cases uniformly hold that noncommercial restraint doctrine turns *not* on whether a party has nonprofit *status* or noncommercial *motives* but rather on whether the *activity restrained* is noncommercial. Nor does antitrust law confer any immunity on conspirators clever enough to attach the sheep's clothing of a donation to their wolfish anticompetitive restraints of trade.

The text of the Sherman Act contains no exemption for nonprofits, however noncommercial their motives or disinterested their incentives. Rather, Sherman Act § 1 states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal," and applies this prohibition to "[e]very person" entering such an agreement. Further, Sherman Act §8 defines "person" to include all "corporations" authorized by state law, which would include nonprofit corporations. Nor does the text provide any language excluding of restraints of trade that are attached to donations.

Accordingly, this Court has explicitly held that nonprofits are fully subject to the Sherman Act. *See NCAA v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984); *American Soc'y v. Hydrolevel*, 456 U.S. 556, 576 (1982).[5] This Court has also

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[5] This conclusion is not only dictated by the statutory text but supported by sound policy. "Non-profit status affects the method of financing . . . and the form in which profits . . . are distributed . . . But no one has shown that it makes the enterprise unwilling to cooperate in reducing competition . . which nonprofit enterprises may dislike on ideological as well as selfish grounds." *Hospital Corp. v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986) (Posner, J.). *Accord* AREEDA & HOVENKAMP, ANTITRUST LAW ¶232.2, at 354-60 (Supp. 1997) (same, adding that "[i]f the behavior is anticompetitive, the consequences are equally detrimental whether or not the actor" is a nonprofit).

repeatedly held that noncommercial motives do not save an otherwise illegal restraint -- even if the entity with the noncommercial motive is a nonprofit or any other public-spirited organization.[6] Indeed, this Court has held that nonprofits are liable for participating in a restraint of trade or commerce even when they receive no benefit (financial or otherwise) for participating in the restraint.[7]

The doctrine excluding noncommercial restraints does not deviate from the statutory text or these well-established precedents. Rather, as the Fourth Circuit correctly observed, it rests squarely on the statutory language that the "restraint" must be "of trade or commerce," and thus excludes cases only where the *activity restrained* is noncommercial, not where the *entity* that engages in the restraint (or its motive) is noncommercial. App. 10a. Petitioner falsely claims the circuits are in conflict, but in fact the Fourth Circuit is correct that all cases hew to this distinction between a noncommercial restraint and a

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[6] *See NCAA*, 468 U.S. at 101 n.23 (rejecting defense that nonprofit had social objective of preserving amateur sports because "good motives will not validate an otherwise anticompetitive practice"); *National Soc'y of Professional Engr's v. United States*, 435 U.S. 679, 681 (1978) (professional association liable for ethical canon even though its "purpose" was to protect "public safety"); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462-63 (1986) (professional association liable even though its purpose was a "legal, moral, and ethical policy of quality dental care"); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-24, 427 & n.11 (1990) (professional association liable even though purpose was to vindicate Sixth Amendment rights because the Sherman Act provides no "immunity from prosecution on the basis of their good intent"). *See also United States v. Brown Univ.*, 5 F.3d 658, 666 n.7 (3d Cir. 1993) (nonprofit is not exempt for restraint on commerce even if nonprofit had a "beneficent objective").

[7] *Hydrolevel*, 456 U.S. at 560-62, 74 (holding nonprofit liable for issuing a letter that, without any benefit to the nonprofit, interpreted a safety standard in a way that restrained trade); *Allied Tube v. Indian Head*, 486 U.S. 492, 501 (1988) (stating antitrust rule of reason would apply to safety standard setting by financially disinterested nonprofit associations).

noncommercial entity/motive. App. 9a-10a. The cases deny immunity to nonprofits with noncommercial objectives whenever their restraint is on commercial activities. *See NCAA*, 468 U.S. at 92-93 (no immunity for nonprofit with noncommercial motive that restrained the sale of broadcast rights); *Hydrolevel*, 456 U.S. at 574, 576 (no immunity for nonprofit with noncommercial motive that restrained the sale of boilers); *Brown*, 5 F.3d at 666-68 (no immunity for nonprofit with noncommercial motive that restrained the sale of education). The cases grant noncommercial immunity to nonprofits only when their restraints are on noncommercial activities. In *Marjorie Webster Jr. College v. Middle States Ass'n*, 432 F.2d 650 (D.C. Cir. 1970), the restraint was on granting *free* accreditation to educational institutions. The absence of any charge for the accreditation meant it was a noncommercial activity, and thus that restraints on that activity were noncommercial. In *Dedication & Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 712 (9th Cir. 1995), the restraint was on soliciting donations. Because soliciting donations did not involve any sale of products or services, it too was not a commercial activity being restrained. Likewise, if two philanthropists agree to divide the "market" for giving charity to the homeless by each taking care of a different side of a city, App. 36a, the restraint would be on giving charity, which is a noncommercial activity. Indeed, far from supporting the proposition that noncommercial nonprofits enjoy any immunity to engage in activities that restrain commercial activities, these cases explicitly reject this proposition. *Dedication*, 50 F.3d at 713; *Marjorie Webster*, 432 F.2d at 654-55 & n.21.[8] In this

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[8]Though *Marjorie Webster* in dicta refers to whether the nonprofit had a "commercial motive," subsequent cases in that circuit repudiate any notion that a noncommercial motive affords any exemption to a nonprofit's restraint on a commercial activity. *See Ass'n for Intercoll. Ath. v. NCAA*, 735 F.2d 577, 583 & n.6 (D.C. Cir. 1984); *Costello Pub'g v. Rotelle*, 670 F.2d 1035,

case, although the transaction includes a donation, the alleged restraint of trade is not on the solicitation or giving of donations. Rather, the restraint is on a clearly commercial activity -- mining vermiculite -- and the anticompetitive effect on that commercial activity was patent on the face of the transfer documents.

If one follows the above precedent and thus properly puts aside petitioner's nonprofit status and allegedly noncommercial purposes, the only remaining factor that petitioner argues affirmatively justifies its assertion of immunity is that the transaction here was coupled to a donation. Pet. 7-10. But there is no authority supporting the proposition that any transaction involving a donation is noncommercial. Such an immunity would, contrary to law, preclude all antitrust review of Microsoft's coupling of Windows 95 and its Internet Explorer on the ground that the latter was "donated." *See* X AREEDA, ELHAUGE & HOVENKAMP, ANTITRUST LAW ¶1758, at 341 & n.2 (1995) (antitrust tying doctrine applies even if the tying or tied products are given free of charge). Indeed, the only circuit other than the Fourth Circuit to consider whether there should be an antitrust immunity for donations to nonprofits explicitly rejected that proposition. *See Ozee v. Amer. Council,* 110 F.3d 1082, 1093 (5th Cir. 1997). That case held that a donation to charity is a commercial transaction when the *donor* receives an "annuity, substantial tax advantage, and the satisfaction of having given to charity." *Id.* The Fourth Circuit decision below is clearly consistent with this ruling since here the donor (Grace) received the tax advantage and satisfaction as well as a suppression of competition far more valuable than any annuity. Moreover, creating a new judicial safe harbor for donations would be unwise since it would merely encourage parties to do what Grace did here, restructure its restraints of trade in the guise of a donation.

1056 (D.C. Cir. 1981); *see also Brown*, 5 F.3d at 667-68; *Hennessey v. NCAA*, 564 F.2d 1136, 1148-49 (5th Cir.1977).

Contrary to petitioner, *Dedication & Everlasting Love* does not support a doctrine providing antitrust immunity to all restraints of trade involving donations to a nonprofit. Pet. 9-10. It merely held that a restraint on the solicitation of donations was not covered because the *restrained* activity -- soliciting donations -- was not a commercial activity. 50 F.3d at 712. There was no claim in that case that the solicitations were restraining commercial activity, and the opinion nowhere held that a nonprofit would be immune if it obtained a donation under conditions that restrained some other commercial activity. There is thus no inter-Circuit conflict on this issue.

Petitioner also wrongly asserts that the Fourth Circuit's decision below conflicts with the Seventh Circuit's decision in *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). Pet. 11-12, 15. But what that case held, relying on *Apex Hosiery v. Leader*, 310 U.S. 469, 482-501 (1940), was that conspiracies to trespass, seize, or vandalize property, or to harass, block, or injure persons, are not restraints of trade even though directed at a business and resulting in a reduction of its output. *See Scheidler*, 968 F.2d 612, 615-17, 622. This is clearly correct. A successful conspiracy to kill Bill Gates would no doubt reduce Microsoft's output, but would be a conspiracy to murder, not a conspiracy to restrain trade. But again the reason is that this sort of activity does not fit within the statutory language of Sherman Act §1, not that the actors are nonprofits with noncommercial purposes. Indeed, neither *Apex* nor *Scheidler* involved nonprofit defendants, and the *Apex* labor union was financially interested in making the employer accede to its demands. The activities were held not to be agreements in "restraint of trade" because they involved no agreement to restrict competition or production, or to withhold the marketing of goods or services. *Apex*, 310 U.S. at 494-95, 497 ("restraint of trade" must involve "some form of restraint upon commercial competition in the marketing of goods or services" or restrict "production"); *Scheidler*, 968 F.2d at 622 (defendants were engaging in "violent

'reprehensible' conduct," not "exercising market power").[9] Those cases have nothing to do with this case, which challenges not violent conduct but an agreement to transfer property on the condition that the recipient not deal with the transferor's rivals, which has the effect of directly restricting vermiculite production, evading a monopolist's antitrust duty to deal, and closely resembles tying and exclusive dealing agreements traditionally covered by antitrust law.

Consistent with the logic of the statutory language, *none* of the above decisions applying the noncommercial restraint doctrine has ever held that it renders only one of the co-conspirators immune from antitrust suit. Either the restraint is "of trade or commerce," and neither conspirator is immune; or the restraint is not "of trade or commerce," and neither conspirator is covered. Yet a mixed holding is precisely what petitioner seeks, for it does not deny that the statute covers Grace. Nor could it since Grace is a for-profit that was acting for totally commercial and anticompetitive purposes in restraining competition by its only rival. Petitioner instead seeks a holding that it is immune from suit even though its co-conspirator, Grace, is not. Pet. 6, App. 9a. Petitioner's position thus conflicts with the logic of the doctrine, which turns on the commercial nature of the restraint, not of the conspirators. Petitioner's position also conflicts, as the Fourth Circuit noted, with the well-established doctrine that an otherwise exempt actor loses its antitrust exemption if it conspires with a nonexempt party. *See Allen Bradley Co. v. Union*, 325 U.S. 797, 809-10 (1945); *United*

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[9] *Apex* also stated that, though its facts did not involve an agreement to withhold labor, *id.* at 504, such an agreement would not be a restraint of trade or commerce, but here it relied on Clayton Act §6, which explicitly defines "labor" as not being "commerce." *Id.* at 502-04. In contrast, an agreement not to buy a firm's products -- even though also involving a union pursuing the very same objectives -- *was* a restraint of trade or commerce. *Id.* at 505-07 ("the objective of the restraint . . . was . . . immaterial because . . . the restraint itself" was "offensive").

States v. Borden Co., 308 U.S. 188, 204-05 (1939); App. 11a. Finally, petitioner's notion that its different motive should save it from antitrust liability also conflicts with the well-established doctrine that knowing participation in an anticompetitive scheme suffices for liability even if one does not share the anticompetitive motive of the co-conspirator.[10] Petitioner offers no answer to these fatal defects in its legal theory.

In short, the decision below by the Fourth Circuit is completely consistent with all decisions involving nonprofits and the noncommercial restraint doctrine that have been rendered by this Court or other circuits, including the above decisions by the Third, Fifth, Seventh, Ninth and District of Columbia Circuits.

Finally, petitioner tries to manufacture a conflict with other decisions that did not concern the noncommercial restraint doctrine at all, but rather concerned the *Noerr* and First Amendment protections for political petitioning. For example, petitioner claims a conflict with the Eighth Circuit decision in *Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980). Pet. 12. But that decision expressly relied not on the noncommercial nature of the restraint but on the fact that it involved political petitioning: "we do *not* rest our decision in this case upon the basis that the boycott was noncommercial and non-economic. Our decision is based upon the right to use political activities to petition the government . . ." 620 F.2d at 1315 n.16 (emphasis

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[10] *Hydrolevel*, 456 U.S. at 573-74 (holding nonprofit liable for participating in a restraint that financially benefits a co-conspirator even though the nonprofit neither engages in the restrained business nor financially benefits from the restraint); *United States v. Paramount*, 334 U.S. 131, 160-61 (1948) ("acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one"); *MCM Prtnr's v. Andrews-Bartlett*, 62 F.3d 967, 972-75 (7th Cir.1995) (collecting cases and finding liable a party coerced into exclusive dealing harming its financial interests); App. 11a. There is also the practical problem that petitioner now holds all the deposits. Thus, any remedy limited to Grace would leave in place the suppression of deposits that was Grace's anticompetitive goal.

added). That decision thus has nothing to do with this case, which does not involve political petitioning. Likewise, as the Fourth Circuit correctly concluded, this case has nothing to do with the First Amendment doctrine of *NAACP v. Claiborne Hardware*, 458 U.S. 996 (1982), both because petitioner identified no "speech" restricted by antitrust review here and because petitioner fails to meet that doctrine's requirement that it -- *and* all other co-conspirators -- be financially disinterested. App. 12a n.2 (citing *Trial Lawyers*, 493 U.S. at 525-28). The alleged conflict with these political petitioning and First Amendment cases is thus pretextual.[11]

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[11] The *Noerr* doctrine that antitrust does not cover genuine political petitioning even when it has an "incidental" effect on commerce is thus not implicated in this case. *See generally Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 142-44 (1961). Market activity, even if it mainly has a political impact, is not considered political petitioning, *Allied Tube v. Indian Head*, 486 U.S. 492, 502-04 (1988), and here the restraint was completely unrelated to any effort to secure political ends. Nor could the effect on commerce here fairly be said to be "incidental" because the agreement terms directly restrained private commerce and on their face were clearly designed to target that anticompetitive effect. The petition tries to create a legal conflict by characterizing the Fourth Circuit as holding that an incidental effect on commerce will (in and of itself) render any otherwise noncommercial restraint commercial. Pet. 11. In fact, the Fourth Circuit neither found the effect here "incidental," nor made any such holding about the implications of incidental effects. The Fourth Circuit merely held that -- under the entire complex of unusual facts here -- the restraint was commercial. Likewise, analogies to political boycotts like the old temperance society boycotts are inapt. Pet. 12. If anything, given Grace's role, the more accurate analogy would be to an agreement between a temperance society and a liquor dealer that the temperance society would, if paid off in land, boycott the liquor dealer's *rival*.

II. The Noncommercial Restraint Doctrine Was Correctly Applied to the Facts Here, Which Would Not Fit Even Petitioner's Proposed Standard and Are So Unusual They Are Unlikely to Recur. It would of course be wrong to conclude that every agreement to donate land to a nonprofit for noncommercial purposes was a commercial transaction covered by antitrust law. But the Fourth Circuit reached no such conclusion, and this is no such case. The very facts that explain why the Fourth Circuit's decision was correct also make clear why this situation was so unusual and unlikely to recur, and why it does not even fit the legal standard petitioner proposes.

The Fourth Circuit decision below relied on a combination of unusual factors in reaching its conclusion that the restraint here was commercial. It noted that the restraint foreclosed a significant market share of the supply of a commercial product. App. 11a. It reasoned that the donor was in the unusual position of using a donation to evade an antitrust duty to deal. App. 8a. It stressed that petitioner knew that it was joining a conspiracy to restrain trade that furthered the anticompetitive motives of its commercial co-conspirator. App. 11a-12a. And it observed that, by joining the conspiracy, petitioner received a large pecuniary gain and furthered the commercial interests of its management and members. App. 11a.

Thus, this was no ordinary donation. Donations are not ordinarily coupled with anticompetitive restraints that foreclose a huge market share to the monopolists' only rival. This one was. Donations are not ordinarily given to evade antitrust duties. This one involved a monopolist who bought up and suppressed resources necessary for competition for twenty years and then, to evade its antitrust duty to make those resources available to rivals, donated away the resources subject to that duty. Donations normally do not (and could not) further any anticompetitive purpose. Here the anticompetitive purpose of the donative restraint was well-known to the donee and patent on its face because it targeted competitors instead of preservationist

concerns. And while donees do normally benefit by the receipt of a donation, they do not normally agree to join an anticompetitive scheme in exchange for hundreds of acres of land, some of which they sell for profit and the rest of which they keep off the market to maintain the market price of property owned by their management and members.

If there are other donations that have been strategically designed to restrain trade, they must be rare and have certainly escaped our attention. This may well be the first strategic donation of its kind. Indeed, it is very difficult to even think of other hypotheticals where a firm could further its market position by giving away its productive resources.

First, to have such a hypothetical one must have a donation coupled with a condition that forecloses a significant market share of a commercial product. The number of a donations coupled with similar conditions is minor; the number that do so in a way that forecloses a significant market share is minuscule. For example, even a donation of all of Hilton Head with a condition prohibiting its use as a resort would not restrain trade because it would not foreclose any significant share of the market for resorts. Here, a huge 80% of the relevant market for deposits were foreclosed to a monopolist's only rival.[12]

Second, even in those cases where a firm does own land controlling a significant market share of a commercial product, it will rarely be the case that a firm can advance its market position and restrain trade by giving that land away with restrictive covenants. Normally, the best way for a firm to further its market position and lessen competition is to retain resources that confer a significant market share, not to give those

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[12]The market for vermiculite deposits in Virginia is the relevant market because that is the only market to which a rival with its processing plant in Virginia can turn given the high costs of transporting raw vermiculite. *See* App. 22a; JA 571-72. Moreover, even if the U.S. market were the relevant one, the restraints foreclosed 40% of U.S. vermiculite deposits. App. 4a.

resources away. What makes this case different (and unusual) is that here the controlling firm was a monopolist who had bought up and suppressed the resources for twenty years, had never used those resources or even built a processing plant in the same state to make mining possible, and was now under an antitrust duty to allow use by its rival unless it could somehow unload the property to someone else. Such cases must be exceedingly rare.

Third, here the strategic anticompetitive purpose of the donation was well-known to the preservationist group and patent on the face of the donation. Why else insert documentary provisions that prohibit vermiculite mining even when it does not cause preservation problems and permit non-vermiculite mining even when it does? *See* Statement of Facts. Few, if any, donations are on their face so blatant about targeting a monopolist's rival and prohibiting only dealings with that rival. Any donation with such an obvious anticompetitive purpose and effect clearly signals the recipient to decline it and its anticompetitive conditions. There is no risk that prohibiting such patently anticompetitive donative restraints would chill petitioner or other charities from accepting normal donations.

Moreover, even if petitioner were correct that a nonprofit should never be liable in antitrust for receiving a donation when its own purposes are purely noncommercial, this would be an extremely poor test case to develop that proposition. For petitioner does not meet its own proposed standard. Petitioner was not acting only or mainly to further noncommercial purposes -- petitioner had financially interests it was furthering. App. 11a. Namely, petitioner received hundreds of acres of land for joining an antitrust scheme that also furthered the financial interests of its members and management. *Id.*[13] Certiorari review should

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[13]Petitioner is correct that its financial interest should not determine whether the restraint is commercial, for any nonprofit soliciting a donation has a financial interest in getting that donation. Pet. 14, and the transaction here would be commercial even if petitioner were financially disinterested. But

hardly be granted to consider adopting a legal standard that the petitioner itself fails to satisfy.

In its own description of its pecuniary gain, Pet 17, petitioner omits the fact that it resold some of the donated land for monetary gain -- and remains free to sell the rest. App. 7a-8a, 11a. Petitioner knew that it would not get this land, and the financial proceeds that followed, unless it joined a conspiracy that it knew had an anticompetitive purpose and effect. Petitioner also omits mentioning that purely preservationist purposes cannot possibly explain the restraints actually agreed to -- both because those restraints would have been unnecessary if petitioner really would never allow vermiculite mining, App. 8a, and because the restraints were deliberately modified to prohibit vermiculite mining even when it does not cause preservation problems and permitted non-vermiculite mining even when it does cause preservation problems. *See* Statement of Facts.

Petitioner also suggests that the only financial benefit to its management and members was the attenuated benefit of deriving satisfaction from having the historic surroundings preserved. Pet 18. But maintaining property values by preventing nearby mining is not at all an attenuated financial benefit -- it is large and concrete. Moreover, the agreement here also directly suppressed an increase in the local supply of marketable land that otherwise would have lowered the market price of the land these

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petitioner is wrong to suggest the Fourth Circuit issued a ruling that a financial interest always makes a restraint commercial. The Fourth Circuit merely held that, on the entire complex of facts, the restraint here was commercial. Since petitioner below argued that it should be immune because it was financially disinterested, it made sense to respond in part with the observation that petitioner in fact had a strong financial interest. App. 11a. One need not believe a financial interest suffices to make a transaction commercial to believe that it is surely commercial to have such a financial interest in knowingly helping a monopolist evade an antitrust duty to deal and foreclose a huge market share to its only rival through restraints patently designed to target that rival rather than any charitable purpose.

management and members owned. This financial interest in protecting the market price of their land from increased competition is clearly not attenuated or noncommercial. Thus, even if petitioner itself did not benefit financially, these financial benefits to its management and members clearly suffice to hold petitioner liable for joining an anticompetitive conspiracy. *See Hydrolevel*, 456 U.S. at 573-74 (holding nonprofit liable even if its agents benefitted themselves rather than the nonprofit).

In short, each piece of property petitioner received for agreeing to join the anticompetitive scheme was either: (1) resold to the direct financial gain of petitioner or (2) kept off the market to maintain the market price of property owned by petitioner's management and members. The financial interest was plain.

These factors clearly suffice to make the challenged agreement commercial. They also suffice to distinguish petitioner's parade of horribles, for hardly any donations of preservation land to nonprofits will: (1) be coupled with conditions that foreclose a significant market share, (2) evade an monopolist-donor's antitrust duty to deal, (3) further a donor's commercial motive in restraining trade that is known to the nonprofit and blatant on the face of the donative restraint, and (4) be motivated by the financial gain the nonprofit and its management and members receives for joining in the anticompetitive scheme. Except for odd cases that replicate the unusual circumstances of this case, donations to preservationist groups and other charities will be completely unaffected by the decision below. When those unusual circumstances do exist, the donative restraint is properly deemed commercial and anticompetitive, and charities should know better than to join such patently anticompetitive schemes.

III. The Argument That I.R.C. §170(h) Creates an Implicit Exemption to the Antitrust Laws Was Not Preserved on Appeal and Involves No Conflict in Lower Court Authority. Before the Fourth Circuit, petitioner never raised the

purported issue of whether I.R.C. §170(h) precludes the application of federal antitrust law to its conduct. That purported issue was raised only in an amicus brief, and was thus quite properly never considered or discussed by the Fourth Circuit.[14] Having failed to properly preserve this issue on appeal, petitioner cannot now raise it for the first time in this Court.

Further, even if petitioner had preserved the issue, petitioner points to no conflict in judicial authority. Instead petitioner alleges a conflict between the decision below and a statute, I.R.C. §170(h). *See* Pet. 19 (claiming Fourth Circuit's interpretation of the Sherman Act conflicts with §170(h).) But this is not the sort of conflict approved as a ground for certiorari review under U.S. SUPREME COURT RULE 10, which cites only conflicts between judicial authority. And there is a very good reason why Rule 10 does not include conflicts between a decision and a statute. A claim of such conflicts is indistinguishable from a claim that a particular court misinterpreted the statute. If this Court were to become a court of errors in every case involving a statutory interpretation, its docket would quickly be swamped by such cases. Thus, as Rule 10 plainly provides, this Court sensibly prefers to wait until judicial authority conflicts on some federal question, including the federal question of how to interpret a federal statute.

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[14] *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 531 n. 13 (1979) (court has no occasion to consider issue raised by amicus but not raised or preserved for appeal by party); *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (same); *Preservation Coalition v. Pierce*, 667 F.2d 851, 861-62 (9th Cir.1982) (very same amicus as in this case tried to raise issue not raised by parties; held it cannot); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 705 n.22 (1st Cir.1994) ("In the court of appeals, amici cannot . . . introduce new issues or issues not properly preserved for appeal."); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1208 (5th Cir.1991) (court cannot consider issues raised only by amici); *United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 732 n.3 (8th Cir.1986) ("Syntex, as amicus, cannot raise issues not raised by the parties."); 3 C.J.S. AMICUS CURIAE §3, at 1052 ("a new question raised only in a brief filed by an amicus curiae . . . will not be considered.' ").

There is no such conflict in this case. Indeed, we are unable to find any published opinion that has ever considered the issue of a conflict between the Sherman Act and §170(h) at all -- probably because, as described next, the issue is entirely bogus.

IV. The Argument That I.R.C. §170(h) Creates an Implicit Exemption to the Antitrust Laws Relies on a Demonstrably False Premise About Tax Law, and Even If Accurate About Tax Law Would Fail to Rebut the Strong Presumption Against Implicit Antitrust Exemptions. Petitioner's purported conflict between the Sherman Act and the Tax Code is bogus because it relies on a demonstrably false premise about tax law. Petitioner's premise is that, absent the anticompetitive restraints Grace imposed on subsequent use of the commercial property it donated, Grace would not have received a tax deduction. Pet. 22. This premise is plainly false. If one gives a charity some property -- be that property money, a Monet painting, or a toxic waste dump that the charity resells -- that donation is deductible to the full market value of the donated property. *See* I.R.C. §170(a), (c); §26 C.F.R. 1.170A-1(c) (1999) (amount of contribution measured by property's market value). A donor need not impose any restriction at all on the charity's use of the donated property to get the deduction. Any restrictions are provided by the tax law defining a charity, which guarantees that any proceeds from market value bestowed on a charity will be used for charitable purposes

I.R.C. §170(h) deals with the entirely separate problem of taxpayers who try to get a deduction when they give away a *partial* property interest, like an easement on the property, and *retain* the rest of the property. In those situations, the Tax Code is quite sensibly worried about giving a tax deduction to a donor who may not have really given away anything of value. The Tax Code thus denies a charitable deduction in those cases, *see* I.R.C. §170(f)(3), unless the donation meets certain exceptions like the "qualified conservation contribution," which is later defined in

I.R.C. §170(h). The combination of §170(f)(3) and I.R.C. §170(h) assures that donors who give *partial* property interests for a purported conservation purpose get a charitable tax deduction only if they have imposed real restrictions on their use of the *retained* property interest. By its express terms, §170(f)(3) applies only to contributions that "consist of less than the taxpayer's entire interest in such property." Thus, donors who give away their *entire* interest in the property, as Grace did here, do not fall within §170(f)(3), and need never meet the requirements of I.R.C. §170(h).[15] In short, the tax benefits to Grace from its donation in no way hinged upon it imposing the anticompetitive restraints prohibiting vermiculite mining by its rivals.

In any event, favorable tax treatment hardly provides an exemption from antitrust law. Otherwise, firms could horizontally fix prices of capital assets in order to create the capital gains that tax law gives favorable treatment. A tax subsidy for a general class of activities has never been thought to implicitly repeal the application of antitrust law to particular forms of that activities that are anticompetitive.

After all, as this Court has stressed: "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" to antitrust law. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). As one scholar put it:

> The Supreme Court's rules for finding exemptions to antitrust policy testify to the dominance of Sherman Act policy: the Court disclaims its authority to create antitrust exemptions, *see* National Soc'y of Professional Engr's v. United States, 435 U.S. 679, 692 (1978), is reluctant to imply them, *see* National

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[15]It is irrelevant whether others have an interest in the same property. All that matters is that Grace gave away all of the interest *it* had in the property. That means its donation was not within §170(f)(3) and thus not need not comply with §170(h) to receive a tax deduction.

> Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378, 388-89 (1981); and construes express exemptions narrowly -- often remarkably so, *see, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979).

Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 713 n.1 (1986).

Accordingly, an antitrust exemption can be "implied only if *necessary* to make the [non-antitrust statute] work, and even then only to the *minimum* extent necessary." *Silver v. NYSE*, 373 U.S. 341, 357 (1963) (emphasis added). That standard is clearly not met here. I.R.C. §170(h) has nothing to do with the conduct in this case. And even if it did, granting an antitrust exemption to the conduct here would in no sense be necessary to make the tax code work. For all the reasons stressed above, the conduct here is extremely unusual and in no way implicates normal donations or efforts to dedicate land for conservation. Providing antitrust immunity to such unusual -- and manifestly anticompetitive -- conduct is thus not at all necessary to the law providing favorable tax treatment for qualified conservation contributions, which normally do not implicate antitrust law at all. Indeed, there is no conflict even on the particular facts of this case since the anticompetitive restraints attached to the donation in question were entirely unnecessary to obtain the desired tax benefit.

This Court has repeatedly told parties that they must go to Congress, not the courts, if they want a special exemption from the Sherman Act. *Patrick v. Burget*, 486 U.S. 94, 105-06 (1988) (physicians must ask Congress for exception to further medical goals); *Professional Eng'rs*, 435 U.S. at 692, 695 (same for public safety goals). Judges have neither the authority nor any principled standards for undertaking the political task of balancing the benefits of competition against its harm to other social goals. If Congress wishes to prohibit vermiculite mining, or grant a special antitrust exemption to groups opposed to such mining, Congress may. But Congress has not done so, and thus

its antitrust statute must be given full effect to the anticompetitive conduct in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 98-1289

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HISTORIC GREEN SPRINGS, INC., *Petitioner,*

v.

VIRGINIA VERMICULITE, LTD., ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, THE LAND TRUST ALLIANCE, AND THE NATURE CONSERVANCY AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The National Trust for Historic Preservation in the United States ("National Trust"), the Land Trust Alliance, and the Nature Conservancy submit this brief as *amici curiae* in support of the petition for a writ of certiorari filed by Historic Green Springs, Inc. ("HGSI").[1]

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[1] Pursuant to Supreme Court Rule 37.6, the National Trust, the Land Trust Alliance, and the Nature Conservancy hereby state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the National Trust, the Land Trust Alliance, the Nature Conservancy, or their members has made a monetary contribution to the preparation or submission of this brief. Petitioner HGSI is a member of the National Trust. Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

INTERESTS OF THE *AMICI CURIAE*

The National Trust is a private, nonprofit, charitable and educational organization chartered by Congress in 1949 to further the historic preservation policies of the United States and to "facilitate public participation" in historic preservation. 16 U.S.C. §§ 461, 468. With the support of its 265,000 members, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The Land Trust Alliance is a national nonprofit organization dedicated to fostering private, voluntary land conservation. Its mission is to strengthen the work of local and regional land trusts nationwide, by providing information and education, fostering supportive public policies, and building public awareness of land trusts and their goals. More than 700 land trusts are members of the Land Trust Alliance, and many others benefit from its programs. The Land Trust Alliance publishes numerous books and reference materials, including the *Conservation Easement Handbook* and the *Standards and Practices Guidebook*, publications which set professional standards to guide the work of land trusts and organizations holding conservation easements. The Land Trust Alliance's Information Center fields more than 2,000 requests for information each year from landowners, government officials, the media, land trusts, and others who have questions about voluntary land conservation.

The Nature Conservancy is a nationwide nonprofit organization with nearly one million members dedicated to the preservation of plants, animals and natural communities. The Nature Conservancy's primary interest is in the preservation of plants and animals that represent the diversity of life on earth by protecting the lands and waters they need to survive. It has operated in the United States for the past 40

years. The Nature Conservancy owns and manages more than 1,500 preserves throughout the United States, making it the operator of one of the largest private systems of nature sanctuaries in the world. The Nature Conservancy acquires conservation lands through a combination of gifts of land and outright purchases. In 1998, the Nature Conservancy protected conservation lands valued at $160 million.

The National Trust, the Land Trust Alliance, and the Nature Conservancy all have a strong interest in ensuring the continued use, validity, and effectiveness of conservation easements and land donations such as those challenged under the antitrust laws in this case. Conservation easements and land donations are important land-use tools that serve to protect hundreds of thousands of acres of historically and environmentally sensitive resources across the country. The Fourth Circuit's ruling that the receipt of donated land by a nonprofit preservation organization may be subject to antitrust challenge directly threatens the continued viability of conservation easements and land trusts. Accordingly, *amici* have a substantial stake in the outcome of this case.

INTRODUCTION AND SUMMARY

The broad language of the Sherman Act has been given content through a common-law process of judicial decisionmaking. *See State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1997); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978). This Court has recently reaffirmed its commitment to reviewing and correcting judicially fashioned antitrust rules. *See NYNEX Corp. v. Discon, Inc.*, 119 S. Ct. 493, 498 (1998); *State Oil*, 118 S. Ct. at 284-85. Similarly, the Court has shown concern for the coherent development of antitrust doctrine thrown into confusion by conflicts of circuit authority. *See, e.g., California Dental Ass'n v. Federal Trade Comm'n*, No. 97-1625 (argued Jan. 13, 1999).

In this case, the Fourth Circuit significantly expanded the scope of the Sherman Act, and departed from well-established precedent, by holding that a nonprofit organization exposes itself to treble damages liability by accepting a charitable donation in furtherance of the organization's mission to preserve a National Historic Landmark District.[2] In reaching this surprising result, the Fourth Circuit eroded the fundamental distinction between commercial conduct that is subject to the Sherman Act and noncommercial conduct that falls outside the scope of the Act.

The Fourth Circuit's decision creates the potential for great confusion in this important area of the law, and subjects charitable and other nonprofit organizations pursuing noncommercial objectives to the threat of antitrust litigation. This Court should grant review to resolve the conflict of authority created by the Fourth Circuit's ruling, and to re-establish the basic principle that nonprofit organizations pursuing noncommercial social and policy objectives are not subject to the antitrust laws.

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[2] The Green Springs National Historic Landmark District is listed on the National Register of Historic Places and has been designated by the Secretary of the Interior as a National Historic Landmark ("NHL"). U.S. Department of the Interior, *National Historic Landmarks* 139 (1976).

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION UNDERMINES ANTITRUST PRINCIPLES ESTABLISHED BY THIS COURT AND CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

A. Noncommercial Activities Are Beyond The Scope Of The Sherman Act.

By its terms, the Sherman Act applies only to "trade or commerce." 15 U.S.C. §§ 1, 2. Accordingly, it is well-settled that noncommercial activities are outside the scope of the Act. This Court has recognized that the proscriptions of the Sherman Act are "tailored . . . for the business world," *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961), and that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives," *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959). *Accord United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993) ("It is axiomatic that section one of the Act regulates only transactions that are commercial in nature."); 1A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 262 (1997) ("[T]he antitrust laws reach only 'commercial' restraints on trade.").[3]

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[3] The legislative history of the Sherman Act confirms that "the drafters never intended to condemn properly defined noncommercial activities." 1A Areeda & Hovenkamp, *supra*, ¶ 262. Senator Sherman responded to a proposal to add an express exemption for temperance societies and other organizations established to pursue moral and social ends by explaining that:

(...continued)

To be sure, nonprofit organizations are not entitled to blanket immunity from the antitrust laws, and are subject to antitrust scrutiny when they engage in commercial behavior.[4] But "it is a leap from the conclusion that charitable form confers no immunity to the conclusion that charitable activities are subject to the Sherman Act when they do not constitute trade in the sense of the common law." *Dedication and Everlasting Love to Animals v. Humane Society*, 50 F.3d 710, 713 (9th Cir. 1995) [hereinafter *DELTA*].

The Court has applied these basic principles to establish limits on the scope of the Sherman Act, and has enforced those limits to protect noncommercial activities such as a labor union strike,[5] the political efforts of an industry trade group,[6] and a civil rights boycott.[7] Federal courts of appeals have applied the same principles to protect

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> I do not see any reason for putting in [an amendment concerning] temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce . . . .

Missouri v. National Org. for Women, Inc., 620 F.2d 1301, 1309 (8th Cir.) (quoting 21 Cong. Rec. 2,658-59 (1890)), *cert. denied*, 449 U.S. 842 (1980); *see also National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 621 (7th Cir. 1992) ("We are convinced by the economic and legislative history of the Sherman Act that it was intended to prevent business competitors from making restraining arrangements for their own economic advantage. . . . Defendants are not involved in business, and have no ability to concentrate economic power."), *rev'd in part on other grounds*, 510 U.S. 249 (1994).

[4] *See NCAA v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984).

[5] *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512-13 (1940).

[6] *Noerr*, 365 U.S. at 129-31.

[7] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)

the accreditation of educational institutions,[8] women's rights boycotts,[9] abortion protests,[10] and the solicitation of charitable contributions.[11] Although some of these activities are protected under the First Amendment, the "Sherman Act's limitation to 'commercial' activities immunizes many acts that the First Amendment does not protect." 1A Areeda & Hovenkamp, *supra*, at ¶ 262.

In deciding the cases cited above, this Court and other courts of appeals have taken great care to define commercial activity in a way that does not sweep in fundamentally noncommercial conduct. These decisions stand in sharp contrast to decisions during the earlier part of this century, in which antitrust courts considered claims that the activities of labor unions, including strikes, boycotts, and other means of protesting adverse working conditions, violated the Sherman Act. Prior to this Court's decision in *Apex Hosiery*, courts regularly entertained such suits and thereby undermined the efforts of organized labor. Similarly, antitrust courts sometimes applied the Sherman Act to condemn political activity undertaken by financially disinterested actors. For example, in *Council of Defense v. International Magazine Co.*, the court of appeals concluded that a boycott of Hearst newspapers by a group of citizens concerned about the paper's political leanings violated the Sherman Act. *See* 267 F. 390, 411-12 (8th Cir. 1920). The Fourth Circuit's decision resurrects the reasoning of these older cases, contrary to this Court's recognition in *Apex Hosiery*, *Noerr*, and *Claiborne*

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[8] *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

[9] *National Org. for Women*, 620 F.2d at 1319.

[10] *Scheidler*, 968 F.2d at 621-23.

[11] *DELTA*, 50 F.3d at 712-13.

Hardware that noncommercial conduct is immune from antitrust scrutiny.

B. Under The Fourth Circuit's Decision, Noncommercial Activities Are Exposed To Antitrust Liability.

Although the Fourth Circuit's decision purports to reach only commercial activities, *see* Pet. App. 10a, the decision adopts a flawed test to distinguish commercial activity from noncommercial activity. The basic error in the Fourth Circuit's analysis is its overly broad concept of commercial activity as including any activity that has a discernible effect on a commercial market confers an economic benefit on the defendant. *See* Pet. App. 11a. The Fourth Circuit's approach exposes a broad range of legitimate social and political activities to potential attack as violations of the Sherman Act.

This Court has made clear that conduct is not rendered "commercial" merely because it has an effect on competition. Although noncommercial activity often has some impact on the competitive marketplace, the Sherman Act was not intended "to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade." *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 806 (1945); *see also DELTA*, 50 F.3d at 714 ("Not every aspect of life in the United States is to be reduced to . . . a single-minded vision of the ubiquity of commerce."). In *Noerr*, the Court declined to "permit[] an extension of the Sherman Act . . . simply because those activities have a commercial impact." 365 U.S. at 140-41; *accord Scheidler*, 968 F.2d at 620 ("Congress did not intend to reach every activity that might affect business."). Whether in the context of political activity, as in *Noerr*, or other noncommercial conduct, it is difficult to envision activities that do not have at least arguable commercial effects. Consequently, a simple "effects test" is over-inclusive.

The Fourth Circuit's "benefits" test is as all-encompassing as its "effects" test. Professors Areeda and Hovenkamp have explained that the appropriate test is whether "the antitrust defendants are likely to receive direct economic benefit *as a result of any reduction in competition in the market in which the target firm or firms operate*." 1A Areeda & Hovenkamp, *supra*, at ¶ 262 (emphasis added). This approach accords with the Court's decision in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), that the "reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'" *Id.* at 427 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988)).[12]

In this case, Respondent HGSI received an economic benefit in the form of a donation of land. But that benefit does not result from a decrease in competition in the vermiculite market. HGSI does not participate in the vermiculite market and does not stand to benefit from a decrease in competition in that market. If anything, a decrease in competition would harm HGSI and its members as consumers of products containing vermiculite.[13]

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[12] The Fourth Circuit erred in concluding that *Trial Lawyers* limits the reasoning of *Claiborne Hardware* to cases in which the defendant is "financially disinterested." Pet. App. 12a n.2. *Trial Lawyers*, and the *Allied Tube* case it follows, support the proposition that anticompetitive conduct by a business competitor who stands to profit from a lessening of competition is fundamentally commercial in nature; those cases provide no support for the quite different proposition that conduct by a non-competitor who does not stand to profit from a decrease in competition is also commercial in nature.

[13] As the district court explained, the activities of a nonprofit preservation organization are comparable to those of abortion (...continued)

In short, if the mere existence of economic effects or the receipt of economic benefits renders activity "commercial" in nature, then virtually all activity will be deemed "commercial" for purposes of the antitrust laws. Under such an approach,

> the Sherman Act embraces everything from a church fair to the solicitation of voluntary blood donors. On this basis, every engagement or marriage would be a restraint of trade, subject to suit and defensible only by application of the rule of reason.

DELTA, 50 F.3d at 714.[14]

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protestors and temperance activists considered by other federal courts and the Congress that enacted the Sherman Act:

> All wish to extinguish a class of producers: those dealing with abortions, liquor, and vermiculite. . . . None profit financially from reducing the supply and increasing the price of their targets – their goal – achieved by a sustained campaign against, as the case may be, abortionists, saloonists, or vermiculite producers. . . . None is alleged to have market power. The object of each is properly classified as political or social.

Pet. App. 38a (citations omitted).

[14] The district court in this case similarly warned that:

> HGSI does not derive pecuniary gain from suppressing vermiculite mining; to the extent that its land values are enhanced by a cessation of mining, this benefit is merely incidental to its overriding goal of preserving land for nonpecuniary reasons. Secondary benefits such as this redound to most, if not all, charitable organizations and quintessentially noncommercial institutions. . . . *Accepting the presence of such benefits as evidence of commercial activity would easily bring virtually any transaction within the scope of the Sherman Act.*

Pet. App. 40a (emphasis added).

The Fourth Circuit's approach jettisons the limiting principle that a nonprofit organization is not engaged in commercial activity unless it stands to benefit from the alleged reduction in competition. As a result, the Fourth Circuit's decision expands the scope of the Sherman Act beyond its proper limits, in violation of basic and longstanding principles established by this Court.

C. The Fourth Circuit's Test For Distinguishing Between Commercial And Noncommercial Conduct Conflicts With Decisions Of Other Circuits.

The Fourth Circuit's definition of commercial activity not only subjects noncommercial conduct to antitrust scrutiny in violation of this Court's prior rulings, but also conflicts with the approaches adopted by other circuits.

First, the Fourth Circuit's decision conflicts with the Ninth Circuit's decision in *DELTA* by holding that receipt of a charitable donation is a commercial benefit sufficient to render a transaction commercial in nature. In *DELTA*, the Ninth Circuit held that "the solicitation of contributions by a nonprofit organization is not trade or commerce" for purposes of the Sherman Act, and therefore the receipt of charitable donations does not violate the Sherman Act even though the recipient "derives reputation, prestige, [and] money for its officers" from the donations. 50 F.3d at 712, 714. In contrast, the Fourth Circuit concluded in this case that the charitable donations received by HGSI were commercial because HGSI received "pecuniary gain" and other benefits from the preservation of the donated land. Pet. App. 11a.

Second, the Fourth Circuit's decision conflicts with the D.C. Circuit's decision in *Marjorie Webster* by holding that a defendant who is not a business competitor can be liable under the antitrust laws absent an anticompetitive intent. The Fourth Circuit, in contrast, held that HGSI's

motive is irrelevant. Pet. App. 11a-12a. In *Marjorie Webster*, the D.C. Circuit held that, in the context of non-competitor defendants, "an incidental restraint of trade absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws." 432 F.2d at 654. The D.C. Circuit's approach is echoed by the Eighth Circuit's decision in *National Organization for Women*, which states that "the organization and objectives involved can make a difference in the application of the Act." 620 F.2d at 1310.

These conflicts, which are discussed in greater depth in the petition for certiorari, *see* Pet. 8-19, will create confusion in the application of the Sherman Act and warrant this Court's review.

* * *

The Fourth Circuit's decision disregards this Court's admonitions about the distinct character of nonprofit organizations pursuing noncommercial objectives, and treats HGSI as if it were a competitor in the vermiculite mining market. Just as the boycotters in *Claiborne Hardware* did not stand to profit financially from a lessening of competition in the boycotted market, 458 U.S. at 914-15, HGSI does not stand to profit financially from a lessening of competition in the vermiculite market. This Court should grant review to ensure that the Sherman Act is not applied to conduct that it was never intended to reach.

II. THE FOURTH CIRCUIT'S DECISION THREATENS TO DETER SOCIAL ACTION BY NONPROFIT ORGANIZATIONS.

The Fourth Circuit's decision will have very significant practical consequences. Most importantly, the threat of antitrust litigation will deter nonprofit organizations from pursuing activities that further the organization's social and policy objectives, but are not constitutionally protected

like the boycott in *Claiborne Hardware* or the government petitioning in *Noerr*. In particular, nonprofit organizations such as *amici curiae* will face new legal risks in accepting donations of property subject to conservation deed restrictions, or placing conservation easements on land to further their noncommercial goals.

A. The Fourth Circuit's Decision Expands The Scope Of Antitrust Liability.

Nonprofit groups pursuing noneconomic social objectives will be vulnerable to antitrust attack under the Fourth Circuit's rule. Whether the objective is preserving land in an undeveloped state, discouraging smoking, or encouraging the use of public transportation instead of automobiles, commercial enterprises can be expected to look for ways to discourage and defeat activities that pose a threat to their businesses.

The Fourth Circuit's decision retains the protections provided by *Noerr* and *Claiborne Hardware* against use of the antitrust laws when the challenged activity implicates constitutionally protected rights. But protection from antitrust attack vanishes under the Fourth Circuit's decision when nonprofit organizations elect to pursue other avenues to achieve social or policy goals, as HGSI did here.

Nothing in the Sherman Act or this Court's prior decisions supports the Fourth Circuit's approach. As Professors Areeda and Hovenkamp have noted, the "Sherman Act's limitation to 'commercial' activities immunizes many acts that the First Amendment does not protect." Areeda & Hovenkamp, *supra*, at ¶ 262. Noncommercial conduct does not become any more commercial simply because it falls outside the protections of the Constitution. Legitimate noncommercial social and political action should remain immune from antitrust scrutiny, whether or not it implicates the First Amendment.

B. Conservation Restrictions On The Use Of Land Are An Important Noncommercial Activity Now Potentially Subject To Antitrust Liability.

Conservation easements, deed covenants and restricted donations are used across the country by land trusts and conservation organizations to protect sensitive historic and environmental resources. Congress has recognized the social importance of such preservation efforts, and indeed has encouraged them by granting tax deductions for the donation of land or conservation easements on land to qualified nonprofit organizations. *See* 26 U.S.C. § 170(h). More than four million acres nationwide are protected through the use of these preservation mechanisms, including roughly 740,000 acres protected by conservation easements alone.[15]

Although easements originated centuries ago in common law, conservation easements, deed covenants and restricted donations have achieved widespread recognition in the last two decades as important tools for protecting historic and environmental resources. More than 1,000 nonprofit organizations and governmental agencies across the country hold preservation easements and similar interests in land.[16] Forty-seven states, including the Commonwealth of Virginia, specifically allow nonprofit organizations and state agencies to accept easement donations.[17] Without such public and private efforts to preserve and protect these vast areas rich in historic and environmental resources, they would be lost to future generations.

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[15] Land Trust Alliance, *1994 National Land Trust Survey*, Summary (1995 Revised).

[16] *Id.*

[17] *Id.*

The Green Springs National Historic Landmark District is just such an area. The 14,000 acre District, named for a mineral spring that served as a spa in the late 1700's, includes 35 homes and numerous early outbuildings, farm structures, simple country churches and rural crossroads villages that contribute to the national significance of the District. National Historic Landmark status is reserved for "properties of exceptional [historic] value to the nation as a whole." 36 C.F.R. § 65.2(a); *see* 16 U.S.C. § 470a(a). A total of 2,211 sites nationwide have received the National Historic Landmark designation; only 155 of these are National Historic Landmark Districts.

Under the Fourth Circuit's decision, land donations for conservation purposes will be subject to antitrust challenge. Such donations typically can be viewed as having "commercial effects" (*e.g.*, the restriction of activities inconsistent with conservation and preservation) and conferring benefits (*e.g.*, a land transfer) on the recipient organization. But when the organization accepting the transfer is not a market participant and does not stand to benefit from an alleged reduction in competition, the transfer is fundamentally noncommercial and should trigger no threat of antitrust liability.

C. The Fourth Circuit's Decision Will Require Courts To Weigh Costs and Benefits They Are Ill-Equipped to Compare.

If the Fourth Circuit's approach is followed, courts will be required to weigh alleged anticompetitive effects against the pursuit of social and policy goals that are not susceptible to traditional economic analysis. As it is, antitrust courts struggle to weigh the purely economic effects of traditional commercial conduct under the rule of reason. *See United States v. Topco Assocs.*, 405 U.S. 596, 609 (1972) ("The fact is that courts are of limited utility in examining difficult economic problems."). That inquiry becomes far

more difficult when courts must compare both economic and non-economic factors.

The immunity rule recognized in *Claiborne Hardware* serves not only to protect noncommercial political action, but also to save antitrust courts from the impossible task of balancing economic effects against non-economic social and policy goals. *See* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 743-44 (1991). In this case, for example, a federal district court is not equipped to determine whether alleged competitive harm in the vermiculite market outweighs the public's interest in preserving historically significant and environmentally valuable undeveloped tracts of land. Under the Fourth Circuit's ruling, however, courts will be called upon to weigh such incommensurable factors.

III. THE LEGAL ISSUES PRESENTED BY THIS CASE ARE RIPE FOR THIS COURT'S REVIEW.

This Court has granted review in numerous cases to resolve antitrust issues prior to a trial on the merits. To cite two recent examples, this Court granted certiorari in *NYNEX Corp. v. Discon* to review a circuit court decision reversing a district court's order granting a motion to dismiss, and in *State Oil v. Khan* to review a circuit court decision reversing a district court's order granting a motion for summary judgment. In neither case did the Court consider it appropriate to await the outcome of a trial on the merits. In this case, as in *Discon* and *Khan*, a trial cannot be expected to shed additional light on the legal questions presented by the petition.

Immediate review of the antitrust immunity question in this case is particularly appropriate so as not to deter nonprofit organizations from continuing to engage in efforts to further their social and policy goals. For many nonprofit organizations that operate on limited budgets, even the threat

of antitrust litigation is a powerful deterrent. Review by this Court at this time is crucial in light of the importance of the questions presented, and the significant confusion and uncertainty created by the Fourth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HISTORIC GREEN SPRINGS, INC.,

Petitioner,

vs.

VIRGINIA VERMICULITE, LTD., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Historic Green Springs[1] respectfully submits this reply brief in further support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

I. THE CIRCUITS ARE PLAINLY IN CONFLICT ON THE SOLE ISSUE BEFORE THE COURT ON THIS PETITION

VVL's wide-ranging assertions notwithstanding, this case, insofar as it relates to Historic Green Springs, has nothing to do with a "monopolist's antitrust duty to deal," the "special doctrine prohibiting a monopolist from buying up and suppressing necessary inputs," or any claims to *per se* antitrust immunity for non-profit organizations. (VVL Br. 13, 2, 8.) Nor can the Court's decision as to certiorari turn on VVL's largely unpleaded and specious contentions regarding the nature of the relevant market, HGSI's "non-preservationist" goals, or any alleged "financial payoff" to HGSI as a "receiving charity." (*Id.* 1, 3, 7.) Rather, one question and one question only is before the Court on this Petition: whether the Fourth Circuit's decision that HGSI's conduct in accepting the Grace Donations was "fundamentally commercial" is in conflict with the decisions of other courts of appeal on the same issue.

VVL's convoluted prevarications aside, the answer to this question is plainly "yes." Indeed, the very standard proposed by VVL, as embodying the Fourth Circuit's reasoning, only highlights the conflict between the Fourth Circuit's decision on this issue and the decisions of other circuits. VVL now contends that "the cases uniformly hold that non-commercial restraint doctrine turns *not* on whether a party has non-profit *status* or non-commercial *motives* but rather on whether the *activity restrained* is non-commercial." (VVL Br. 8.) VVL's focus on the nature of the "activity

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[1] All capitalized terms herein have the same meaning assigned to them in the Petition.

restrained" is patently in conflict with decisions—by this Court and the Seventh, Eighth, and District of Columbia Circuits—that have concluded that "non-commercial" conduct that has collateral effects on a "commercial market" is not transformed, solely by virtue of such effects on commercial activity, into "commercial" conduct for purposes of the Sherman Act.[2]

Interestingly enough, VVL's "activity restrained" standard is also inconsistent with the test adopted in the authoritative treatise to which VVL's counsel of record is now a contributor. *See* IA Areeda & Hovenkamp, *Antitrust Law* (1997). Professors Hovenkamp and Areeda proposed therein that:

> The most sensible rule is a strong presumption that a boycott or other claimed antitrust violation is "economic," or commercial, when the antitrust defendants are likely to receive *direct economic benefit as a result of any reduction in competition in the market in which the target firm or firms operate.*

Id. ¶ 262a (emphasis added). This standard's focus on "economic benefit" that can be traced to a "reduction in competition" in a "relevant market" is consistent with the reasoning of the circuit decisions with which the Fourth Circuit's decision is in conflict, with HGSI's arguments as to why its acceptance of the Grace Donations should not subject it to antitrust liability, and with the conclusion that "[n]ot every aspect of life in the United States is to be reduced to . . . a single-minded vision of the ubiquity of commerce."

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[2] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *National Org. for Women (NOW) v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *aff'd in part and rev'd in part*, 510 U.S. 249 (1994); *State of Missouri v. NOW*, 620 F.2d 1301 (8th Cir. 1980); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir. 1970); *see generally* Petition § I.B.

Dedication & Everlasting Love to Animals (DELTA) v. Humane Soc'y, 50 F.3d 710, 712 (9th Cir. 1995). VVL's adoption of an alternative standard in this case suggests that there is conflict on this issue (at least for purposes of this case) even in the world of antitrust academics, which (given the role of academics, generally, in antitrust jurisprudence) suggests, in turn, that the conflict in the circuits on this issue is unlikely to be resolved anytime soon without this Court's intervention.

Thus, this Court should grant certiorari to address the difficult questions raised by the "highly unusual," but far from unique, facts of this case. Framed more expansively (to highlight facts glossed over by VVL), the pivotal question should be whether the mere acceptance of a donation of land by a non-profit organization can constitute "commercial conduct" for purposes of the Sherman Act, where the organization's pursuit of its non-profit mission is conceded not to be a "sham,"[3] the land donated subject to mining restrictions was within a federally-protected National Historic Landmark District,[4] any alleged anticompetitive consequences of the donation remain redressable by virtue of undismissed non-Sherman Act § 1 claims against the donor,[5]

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[3] VVL's current accusations notwithstanding, the Complaint conceded that HGSI was "organized for charitable and educational purposes" and had long "opposed mining and other development in the Landmark district." (Compl. ¶¶ 29, 33.)

[4] That mining restrictions on Green Springs lands should be challenged as an antitrust violation is utterly inconsistent with the National Historic Preservation Act, 16 U.S.C. § 470, *et seq*, and the Mining Within the National Parks Act, 16 U.S.C. § 1901, *et seq*., both of which seek to limit mining activities in congressionally-ratified National Historic Landmark Districts like the Green Springs Landmark District. *See* Petition at 3-5.

[5] VVL's Complaint also asserted Sherman Act § 2 and state antitrust claims, which remain pending as to Grace, and which could provide VVL with a full remedy for any anticompetitive consequences attributable to the Grace Donations, especially if, as VVL argues, the focus of the

Continued on next page

and the non-profit organization's sole impetus for participating in the challenged transaction was the receipt of a donation of land that could in no way facilitate its participation as a competitor in any relevant market.[6]

II. HGSI'S HISTORIC STRUCTURES TAX ACT ARGUMENTS COULD HAVE AND SHOULD HAVE BEEN ADDRESSED BY THE FOURTH CIRCUIT

VVL's contentions that HGSI's Historic Structures Tax Act arguments were "not preserved on appeal" and "relied on a demonstrably false premise about tax law" are patently false. (VVL Br. 20, 22.) In point of fact, HGSI's preservation tax law arguments were before the Fourth Circuit for determination, were founded on a correct understanding of applicable tax law, and remain integral to the proper disposition of this case. Indeed, absent consideration of the tax and preservation law concerns underlying the Grace Donations, what VVL characterizes (inappropriately) as the "highly unusual" facts of this case would be all but incomprehensible.

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requisite antitrust analysis should be on eliminating "restraints" on competitive activity, rather than foreclosing "benefits" to competitive actors.

[6] VVL's reliance on a string of factually distinguishable cases for the proposition that "knowing participation in an anticompetitive scheme suffices for liability even if one does not share the anticompetitive motive of the co-conspirator" should not control the Court's decision in this case. (VVL Br. 14.) Where, as here, the activities of the two alleged conspirators take place in different, non-overlapping spheres (one non-commercial, the other commercial), the relationship between the two parties is more akin to that of consumer and tying seller, circumstances under which the consumer (*i.e.*, the recipient of the allegedly anticompetitive donation) has never been subject to antitrust liability. *See generally* American Bar Ass'n, Section of Antitrust Law, I *Antitrust Law Developments (Fourth)* § I.D.3(a) (1997).

As set forth in the Petition, the Complaint alleges that Grace donated entire *or partial interests* in Green Springs land to HGSI subject to an alleged agreement between Grace and Historic Green Springs that such land would be used exclusively for conservation or preservation purposes (*i.e.*, not for mining) and that, in return, Grace received a "sizable tax deduction." (Compl. ¶ 25; *see id.* ¶ 99 ("Grace assigned to HGSI *substantially all* of Grace's interests" (emphasis added)).) Such a conveyance of a "qualified real property interest" to a "qualified organization," with conditions that ensure that the property will be used "exclusively for conservation purposes" plainly made Section 170(h)'s requirements for a "qualified conservation contribution" relevant to any judicial assessment of the Grace Donations.

The Fourth Circuit failed entirely to acknowledge the relevance of Section 170(h)'s requirements or the preservation policies those requirements served. Instead, it deemed subject to antitrust scrutiny the very act (*i.e.*, making a donation in conformity with Section 170(h)) that the Historic Structures Tax Act and related statutes expressly permitted and promoted. In so doing, the Fourth Circuit's decision created the type of conflict between two statutory schemes that has long qualified (VVL's current contentions notwithstanding) for certiorari review under the rubric of "important federal statutory issues." Robert L. Stern, et al., *Supreme Court Practice* § 4.13 (7th ed. 1993); *see, e.g., National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 820 (1978); *United States v. Coleman*, 390 U.S. 599, 601 (1968); *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964). Review should thus be granted to address this important question of statutory construction.

A. THE I.R.C. § 170(H) ARGUMENTS WERE BEFORE THE FOURTH CIRCUIT

VVL's contrary contentions notwithstanding, HGSI's I.R.C. § 170(h) arguments were plainly before the Fourth Circuit for decision. Indeed, the significance of these

policies and their role in the Grace Donations were raised before the Fourth Circuit in briefs filed by both HGSI and *amici curiae* National Trust for Historic Preservation and Land Trust Alliance (together, the "National Trust"). Thus, in its appellee's brief to the Fourth Circuit, HGSI argued that "[t]he federal antitrust laws should not be applied directly to contravene federal historic preservation policy, especially where, as here, the historic preservation statutes were adopted subsequent to the Sherman Act and thus impliedly repeal the earlier statute in the event of conflict." (Brief for Defendant-Appellee at 24.) Similarly, in its Petition for Rehearing, HGSI contended that the Fourth Circuit "failed to consider the conflict which its decision created between the Sherman Act and the National Historic Preservation Act." (Petition for Rehearing at 14.)

The amicus brief filed by the National Trust made these arguments, as VVL concedes, even more compellingly. (*See* Brief of Amici Curiae National Trust at 2 ("VVL's claims are inconsistent with the federal tax law requirement that qualified conservation easements must ensure prohibition of surface mining").) Indeed, the National Trust's brief presented this issue so persuasively that VVL felt obligated to take issue with I.R.C. § 170(h)'s relevance to this case in a Response to the Trust's Motion for Leave to file its amicus brief. VVL contended therein that the National Trust's "amicus brief ma[de] no attempt to explain how the law and policies governing qualified conservation easements has any bearing on [Grace's] transfers of fee simple interests and leases," to which the Trust responded that "[i]t is entirely within [the Fourth Circuit's] discretion to recognize that the essential nature of the restrictions on the challenged donation is that of a conservation easement." (VVL Response to Motion for Leave at 4; National Trust Reply at 4.) In light of this appellate level debate, in which VVL vigorously participated, it is incredible that VVL should now contend

that these arguments were never presented to the Fourth Circuit.

However, even if HGSI (as opposed to the *amici curiae*) had not fully tendered these arguments to the Fourth Circuit, this Court would still have discretion to consider them on appeal. VVL's boilerplate citations notwithstanding, the Court has many times "rel[ied] on factual information, cases or analytical approaches provided only by an amicus." *Supreme Court Practice* § 13.13; *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Turner v. Safley*, 482 U.S. 78, 93, 95 (1987); *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (Stevens, J., dissenting). On rare occasions, this Court has even decided cases on a ground "raised only in an amicus brief." *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991).

Indeed, even if neither HGSI nor the *amici* had presented the issues to the Fourth Circuit, this Court would not be precluded from addressing them now. While "[o]rdinarily this Court does not decide questions not raised or resolved in the lower court, this rule is not inflexible." *Youkaim v. Miller*, 425 U.S. 231 (1976). To the contrary, in a variety of "exceptional cases coming here from the federal courts," the Court has granted review to "questions not pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see, e.g., Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Pollard v. United States*, 352 U.S. 354, 359 (1957); *Terminello v. Chicago*, 337 U.S. 1 (1949).

Under any of these tests, this case would present the Court with the requisite "exceptional circumstances." As set forth *supra* and in the Petition, the Fourth Circuit's decision raises important issues of federal statutory construction and, unless reversed, will likely give rise to widespread confusion as to whether Section 1 of the Sherman Act limits or conditions the ability of commercial interests to make, and

non-profit organizations to accept, donations of land in conformity with Section 170(h) of the Internal Revenue Code. Guidance from this Court on the relationship between these two statutory schemes is essential to the future of charitable land donations in this country.

B. THE I.R.C. § 170(H) ARGUMENTS ARE CORRECTLY PREMISED

HGSI's I.R.C. § 170(h) arguments are also founded on a correct understanding of applicable tax law. VVL's current contentions to the contrary are based on both a wholesale misstatement of the Complaint's allegations and a patently incomplete account of the relevant tax code provisions and related IRS regulations.

VVL now claims that Section 170(h) is inapplicable to the present facts because it only applies where a donor gives away a "partial property interest," whereas here Grace gave away its "entire interest" in the Green Springs property. (VVL Br. 23.) However, this contention runs directly counter to the allegations of the Complaint, which claims no more than that Grace gave away "substantially all" of its property interests, and which concedes that the transfers to HGSI were made "subject" to agreements that allowed both Grace and certain third parties to retain "interests" in the donated land.[7] Accordingly, even if, as VVL now (incorrectly) argues, Section 170(h) only applied to

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[7] Each of the conveyances from Grace to HGSI related, *inter alia,* to parcels with respect to which prior owners arguably shared with Grace control of the future "extraction or removal of minerals" by surface mining. In suits consolidated with the VVL action below—and vigorously contested by Grace—members of the Peers families alleged that the original deeds conveying their property to Grace reserved to them a right of control over the "extraction" of vermiculite that was expansive enough to preclude Grace from extinguishing its obligations thereunder by donating the property to HGSI. *See* App. 12a-14a.

"contributions that 'consist of less than the taxpayer's entire interest in such property,'" the Grace Donations would fall within the ambit of Section 170(h). (VVL Br. 23.)

VVL's grasp of the applicable law, however, is no better than its recollection of the Complaint's allegations. VVL also now contends that "all that matters is that Grace gave away all of the interests it had in the property," and that it is consequently "irrelevant whether others have an interest in the same property." (VVL Br. 23 & n.15.) But Section 170(h) expressly contemplates, and prescribes mining restrictions that apply to, circumstances where "the ownership of the surface estate and mineral interests has been and remains separated"—with one interest in the donor and the other in an unrelated third-party. 26 U.S.C. § 170(h)(5)(B)(ii). Accordingly, as IRS regulations confirm, Section 170(h) restrictions on mining are required regardless of whether the donor *or* a third party (such as the Peers or the other original owners of the Green Springs property) retains an interest in donated property. *See* 26 C.F.R. § 1.170A-14(g)(4)(iii) (illustrating application of Section 170(h)(5)(B)(ii) with example where deductibility of donation of land in which "unrelated person" holds mineral interest is conditioned upon use restriction).

Based upon a correct understanding of the facts and applicable law, the relevance of Section 170(h) to any judicial assessment of the Grace Donations is not even debatable. Grace sought to make, and HGSI to accept, donations of Green Springs land. All things being equal, Grace might have sought to make these donations, as VVL suggests, based solely upon I.R.C. § 170(a). However, in light of the interests in these properties purportedly retained by the Peers families and others, the most prudent course for Grace to follow arguably would have been to document its donations in a fashion that would sustain scrutiny under either Section 170(a) or Section 170(h). By alleging that Grace made the Grace Donations "subject to express

restrictions forbidding mining," VVL asserted that Grace did precisely this, and VVL should consequently be estopped from claiming, in the context of this Petition, that "I.R.C. § 170(h) has nothing to do with the conduct in this case." (Comp. ¶ 38; VVL Br. 23.) To the contrary, Section 170(h) had as much or more to do with the facts of this case as any of VVL's allegations of a Sherman Act § 1 conspiracy between Grace and Historic Green Springs.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition, Historic Green Spring's petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

RESPECTFULLY SUBMITTED,

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